

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED STRANGIO and TOM STRANGIO,
doing business as Strangio Bros., and HAROLD
LESLIE and JAMES C. BENSCHOTER,
Appellants,

vs.

CONSOLIDATED INDEMNITY AND INSUR-
ANCE COMPANY, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

FILED
DEC 21 1932
PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED STRANGIO and TOM STRANGIO,
doing business as Strangio Bros., and HAROLD
LESLIE and JAMES C. BENSCHOTER,
Appellants,

vs.

CONSOLIDATED INDEMNITY AND INSUR-
ANCE COMPANY, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer	10
Answers to Interrogatories.....	20
Answer to Complaint in Intervention of Leslie	43
Answer to Complaint in Intervention of Benscho- ter	51
Assignment of Errors.....	117
Bond	125
Complaint	1
Complaint in Intervention of Leslie.....	23
Complaint in Intervention of Benscho- ter.....	34
Clerk's Certificate	132
Citation	133
Decree	67
Findings of Fact and Conclusions of Law....	60
Interrogatories to Defendant.....	18
Narrative of the Evidence.....	71
Order Transferring Cause to San Francisco..	22
Order Allowing Appeal.....	124
Petition for Appeal.....	116
Praecipe	128
Praecipe	131

Index	Page
WITNESSES FOR COMPLAINANT:	
PIERCE J. DEASY	
Direct Examination	75
Cross-examination	78
Redirect Examination	85
Recross Examination	86
FRED J. GORHAM	
Direct Examination	87
Cross-examination (by Mr. Atherton)	92
Cross-examination (by Mr. Hayne)..	92
Redirect Examination	97
Recross Examination	98
EMILE L. MATTHIAS	
Direct Examination	102
Cross-examination	104
Redirect Examination	106
Recross Examination	109
TOM STRANGIO	
Direct Examination	101

NAMES AND ADDRESSES OF ATTORNEYS.

WARREN H. ATHERTON,

Bank of America Building, Stockton, California,

Attorney for Defendants and Appellants.

SIDNEY C. BENNETT,

Bank of America Building, Stockton, California,

Attorney for J. C. Benschoter, Intervenor and Appellant.

NUTTER & RUTHERFORD,

A. P. HAYNE,

Stockton Savings & Loan Bank Building, Stockton, California,

Attorneys for H. Leslie, Intervenor and Appellant.

GLENSOR, CLEWE, SCHOFIELD & VANDINE,

Mills Building, San Francisco, California,

Attorneys for Complainant and Appellee.

In the Northern Division of the District Court of the United States for the Northern District of California.

3040 L. No. 524. In Equity.

CONSOLIDATED INDEMNITY & INSURANCE COMPANY, a corporation,

Complainant,

vs.

FRED STRANGIO and TOM STRANGIO,
doing business as Strangio Bros.,

Defendants.

COMPLAINT TO RESCIND AND CANCEL
POLICY OF INSURANCE.

Complainant above named complains of defendants above named and for cause of action alleges:

I.

That at all times herein mentioned and at the time of the commencement of this action, complainant above named was and is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York was and is a citizen and resident of the State of New York; was and is engaged in the business of insurance; has complied with all the laws of the State of California relating to insurance companies; was and is duly entered and authorized to do business in the State of California; and to engage in the in-

insurance business therein, and had and has an office and an agent of record in said state.

II.

That at all times herein mentioned and at the time of the commencement of this action defendants above named were citizens and residents of the State of California and were and are residents of the County of San Joaquin in said state. [1]*

III.

That on the 21st day of October, 1930, defendants above named applied to complainant above named for the issuance of a policy of insurance insuring defendants against loss from the liability imposed by law upon said defendants on account of bodily injury, whether resulting fatally or not, suffered or alleged to have been suffered within the policy period, by any person or persons by reason of the ownership, maintenance or use of a certain automobile, to-wit: a Studebaker Phaeton Big Six, 1926 model, factory motor number 20488 (hereinafter for convenience referred to as "said automobile") and agreeing on the part of complainant to do certain things in connection with said insurance more specifically hereinafter set forth, and to make payment, defend, investigate and to insure said defendants against loss on account of the liability imposed by law upon the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

said defendants because of the damage to or destruction of property of every description (including the resulting loss of use of such property but excepting property of the assured or property rented or leased by the assured, or property in the custody of the assured, and for which the assured was or is legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use or maintenance of said automobile, including damage or destruction by fire.

That at the time of applying for said insurance on the said 21st day of October, 1930, the said defendants requested complainant to issue said policy effective as of 12:01 o'clock A. M. on the 18th day of October, 1930, and to make the policy period of said policy for twelve (12) calendar months beginning on the said 18th day of October and ending on the 18th day of October, 1931, at 12:01 o'clock A. M. as to both dates Standard Time. [2]

IV.

That pursuant to said request, and deceived and misled by the concealment hereinafter complained of, complainant did on the said 21st day of October, 1930, issue its policy of insurance number AL 6240 in favor of defendants as assureds therein, wherein and whereby complainants did agree as follows:

1. To insure the assured against loss from the liability imposed by law upon the assured on account of bodily injuries, whether resulting fatally or not, suffered or alleged to have been suffered, within the policy period, by any person or persons by reason of the ownership, maintenance or use of said automobile.

2. To investigate accidents involving such injuries upon notice by assured and to negotiate all claims made, as may be deemed expedient, by complainant.

3. To defend in the name and on behalf of the assured suits for damages, even if groundless, brought on account of such injuries, unless and until the complainant shall elect to effect settlement thereof.

4. To pay all costs taxed against the assured in any legal proceedings defended by the company, all accruing interest on judgment entered as a result thereof, all premium charges on attachment or appeal bonds required in such legal proceedings, and all expenses incurred by the company for investigation, negotiation and defense.

5. To reimburse the assured for the expense incurred in providing such immediate surgical relief as imperative at the time of the accident.

6. To extend the insurance provided by the policy so as to be available in the same manner as to the named assured and under the same con-

ditions to additional assureds [3] not thereafter excepted.

7. To extend the insurance and to make payment as therein provided and in like manner to defend and investigate and to insure the assured against loss on account of the liability imposed by law upon the assured because of damage or destruction of property of every description (including the resultant loss of use of such property, but excepting property of the assured, or property rented or leased by the assured, or property in the custody of the assured and for which assured is legally responsible, or property carried in or upon any automobile of the assured), resulting from the ownership, use, maintenance of said automobile, including damage or destruction by fire.

That in and by the terms of said policy, it was agreed that the complainant's liability under said policy to one or all of the assured in respect of said automobile was, as respects bodily injuries to and the death of one person, and should be in a sum not to exceed \$10,000, and, subject to the same limits for each person, the complainant's liability as respects bodily injuries or death of more than one person, was and should be a sum not to exceed \$20,000, and that the complainant's liability for damage insured against in sub-paragraph 7 hereinabove set forth, for each accident, irrespective of the number of claimants, was and should be in a sum of not to exceed the sum of \$5000.

V.

That complainant was induced to issue said policy by the fraud, deceit and concealment of defendants in the following particulars: that on the 19th day of October, 1930, while said automobile was being operated upon a public street or highway in the City of Stockton, County of San Joaquin, State of California, it came into collision with great force [4] and violence with an automobile then and there operated by one J. C. Benschoter, whereby the said automobile of said Benschoter suffered damage and whereby one Harold Lester, who was then and there a passenger in the said automobile operated by said Benschoter, received bodily injuries which caused and resulted, among other things, in the amputation of said Lester's right arm.

VI.

That all of the facts, matters and things set forth in paragraph V hereof, to-wit: the said collision on the said 19th day of October, 1930, the damage and injury to said Lester, and the damage and injury to the property of said Benschoter, were all known to defendant and were unknown to complainant on the said 21st day of October, 1930, when said policy was issued, and were concealed by said defendants from complainant and were not communicated to complainant, nor was complainant advised thereof in any manner or to any extent whatsoever. That had the said defendants commu-

nicated said facts to complainant at any time before the issuance of said policy, the complainant would not have issued said policy.

VII.

That the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3000; that the value of the object to be attained by this action, to-wit: the rescission, cancellation and surrender of said policy, exclusive of interests and costs, exceeds the sum of \$3000.

VIII.

That complainant first learned of said concealment and of the facts and matters and things set forth in paragraph V above, on or about the 25th day of October, 1930, and thereupon and on the 29th day of October, 1930, gave notice [5] to defendants that complainant thereby rescinded and cancelled its said policy upon the ground of said fraud and concealment and demanded that defendants surrender and deliver said policy to complainant. That defendants have expressly refused to surrender said policy or to deliver it to complainants. That no premium has been paid upon said policy whatsoever, and complainant has received no consideration whatsoever for the issuance of said policy.

WHEREFORE, complainant prays the judgment and decree of this Court adjudging that said policy and the issuance thereof was procured by

fraud and concealment; adjudging and decreeing that said policy is null and void and of no force or effect, and rescinding, annulling and cancelling the same, ordering and directing the said defendants to surrender said policy to complainant; for such other and further relief as to the Court may seem just and is meet and agreeable to equity;

And complainant will ever pray, etc.

GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainant.

State and Northern District of California,
City and County of San Francisco.—ss.

Pierce J. Deasy, being duly sworn, deposes and says:

That he is agent in the State of California for complainant above named; that the facts stated in said complaint are within the knowledge of affiant and not within the knowledge of any other officer or agent of complainant; that affiant therefore makes this verification on complainant's behalf; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on informa- [6] tion or belief, and as to these matters and things he believes it to be true.

PIERCE J. DEASY.

Subscribed and sworn to before me this 6th day of November, 1930.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and
County of San Francisco, State of Cali-
fornia.

[Endorsed]: Filed Nov. 7, 1930. [7]

[Title of Court and Cause.]

ANSWER OF DEFENDANTS.

Come now the defendants Fred Strangio and Tom Strangio, doing business as Strangio Bros., and answering the complaint in equity of complainant admit, allege, and deny as follows:

I.

Defendants admit paragraphs I and II of the complaint.

II.

Defendants deny that on the 21st day of October, 1930, defendants above named applied to complainant above named for the issuance of a policy of insurance insuring defendants against loss from the liability imposed by law upon said defendants on account of bodily injury, whether resulting fatally or not, suffered or alleged to have been suffered within the policy period, by any person or persons by reason of the ownership, maintenance

or use of a certain automobile, to-wit: a Studebaker Phaeton Big Six, 1926 model, factory motor number 20588 (hereinafter for convenience referred to as "said automobile") and agreeing on the part of complainant to do certain things in connection with said insurance more specifically hereinafter set forth, and to make payment, defend, investigate and to insure said defendants against loss on account of the liability imposed by law upon the said defendants because of the damage to or destruction of property [8] of every description (including the resulting loss of use of such property but excepting property of the assured or property rented or leased by the assured, or property in the custody of the assured, and for which the assured was or is legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use or maintenance of said automobile, including damage or destruction by fire.

In the foregoing connection defendants allege that they applied to complainant above named on the 18th day of October, 1930, for the issuance of a policy of insurance insuring defendants against loss from the liability imposed by law upon said defendants on account of bodily injury, whether resulting fatally or not, suffered or alleged to have been suffered within the policy period, by any person or persons by reason of the ownership, maintenance or use of a certain automobile, to-wit: a Studebaker Phaeton Big Six, 1926 model, factory

motor number 20588 (hereinafter for convenience referred to as "said automobile") and agreeing on the part of complainant to do certain things in connection with said insurance more specifically hereinafter set forth, and to make payment, defend, investigate and to insure said defendants against loss on account of the liability imposed by law upon the said defendants because of the damage to or destruction of property of every description (including the resulting loss of use of such property but excepting property of the assured or property rented or leased by the assured, or property in the custody of the assured, and for which the assured was or is legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use or maintenance of said automobile, including damage or destruction by fire. [9]

Defendants deny that they applied for the insurance referred to in paragraph III of complainant's complaint on the 21st day of October, 1930, but admit that at the time of applying for said insurance, to-wit, on the 18th day of October, 1930, the said defendants requested complainant to issue said policy effective as of 12:01 o'clock A. M. on the 18th day of October, 1930, and to make the policy period of said policy for twelve (12) calendar months beginning on the said 18th day of October and ending on the 18th day of October, 1931, at 12:01 o'clock A. M., as to both dates Standard Time.

III.

Defendants deny that complainant was deceived and/or misled by the application of defendants and/or by any concealments; defendants have no information or belief sufficient to enable them to answer complainant's allegation that it issued its policy of insurance number AL 6240 on the 21st day of October, 1930, and basing their denial upon that ground, defendants deny that complainant issued its said policy of insurance number AL 6240 on the 21st day of October, 1930, and in this connection defendants allege that complainant issued its policy of insurance number AL 6240 in favor of defendants on or about the 18th day of October, 1930, wherein and whereby complainant did agree as follows:

1. To insure the assured against loss from the liability imposed by law upon the assured on account of bodily injuries, whether resulting fatally or not, suffered or alleged to have been suffered, within the policy period, by any person or persons by reason of the ownership, maintenance or use of said automobile.

2. To investigate accidents involving such injuries upon notice by assured and to negotiate all claims made, as may be deemed expedient, by complainant. [10]

3. To defend in the name and on behalf of the assured suits for damages, even if groundless, brought on account of such injuries, unless and

until the complainant shall elect to effect settlement thereof.

4. To pay all costs taxed against the assured in any legal proceedings defended by the company, all accruing interest on judgment entered as a result thereof, all premium charges on attachment or appeal bonds required in such legal proceedings, and all expenses incurred by the company for investigation, negotiation and defense.

5. To reimburse the assured for the expense incurred in providing such immediate surgical relief as imperative at the time of the accident.

6. To extend the insurance provided by the policy so as to be available in the same manner as to the named assured and under the same conditions to additional assureds not thereafter excepted.

7. To extend the insurance and to make payment as therein provided and in like manner to defend and investigate and to insure the assured against loss on account of the liability imposed by law upon the assured because of damage or destruction of property of every description (including the resultant loss of use of such property, but excepting property of the assured, or property rented or leased by the assured, or property in the custody of the assured and for which assured is legally responsible, or property carried in or upon any automobile of the assured), resulting from the

ownership, use, maintenance of said automobile, including damage or destruction by fire.

That in and by the terms of said policy, it was agreed that the complainant's liability under said policy to one or all of the assured in respect of said automobile was, [11] as respects bodily injuries to and the death of one person, and should be in a sum not to exceed \$10,000, and, subject to the same limits for each person, the complainant's liability as respects bodily injuries or death of more than one person, was and should be in a sum not to exceed \$20,000, and that the complainant's liability for damage insured against in sub-paragraph 7 hereinabove set forth, for each accident, irrespective of the number of claimants, was and should be in a sum of not to exceed the sum of \$5000.

IV.

Defendants deny that complainant was induced to issue said policy by the fraud and/or deceit and/or concealment of defendants with respect to a collision with an automobile being operated by one J. C. Benschoter, which said accident occurred on the 19th day of October, 1930, and defendants deny that complainant issued its said policy by reason of any fraud and/or deceit and/or concealment of defendants.

V.

Defendants admit that all of the facts, things and matters connected with said collision on the

19th day of October, 1930, became known to them on the 19th day of October, 1930; defendants have no knowledge or belief sufficient to enable them to answer complainant's allegation that the facts, matters and things connected with said collision were unknown to complainant on the 21st day of October, 1930, and basing their denial on that ground defendants deny that said facts, matters and things were unknown to complainant on the 21st day of October, 1930, and in this connection defendants allege that said facts were known to complainant on the 21st day of October, 1930; defendants deny that said facts and/or matters and/or things were concealed by defendants from complainant, and deny that they were not communicated to complainant, and in this connection defendants allege that all of the facts, matters [12] and things connected with said collision on the 19th day of October, 1930, were communicated to complainant forthwith after said collision.

VI.

Defendants deny that complainant first learned of said alleged concealment and of the facts and/or matters and/or things with reference to said collision with J. C. Benschoter on or about the 25th day of October, 1930, and in this connection defendants allege that complainant learned of the facts, matters and things connected with said collision on or about the 19th day of October, 1930.

VII.

Defendants deny that no premium has been paid upon said policy and in this connection defendants allege that the premium has been fully paid and has been retained by complainant and has not been tendered to and/or returned to defendants.

WHEREFORE, defendants pray that complainant take nothing, and for such other relief as is meet and agreeable to equity.

M. P. SHAUGHNESSY,
WARREN H. ATHERTON,
Attorneys for Defendants. [13]

Northern District of California,
County of San Joaquin.—ss.

Tom Strangio, being first duly sworn, deposes and says:

That he is one of the defendants above named; that he has read the foregoing answer of defendants, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

TOM STRANGIO.

Subscribed and sworn to before me this third day of December, 1930.

[Notarial Seal] WARREN H. ATHERTON,
Notary Public in and for the County of San
Joaquin, State of California.

[Endorsed]: Filed Dec. 4, 1930. [14]

[Title of Court and Cause.]

INTERROGATORIES PROPOUNDED BY
COMPLAINANT TO DEFENDANTS UN-
DER EQUITY RULE NUMBER FIFTY-
EIGHT TO BE ANSWERED BY DE-
FENDANTS UNDER OATH.

INTERROGATORY NUMBER ONE:

To what officer, agent, servant or employee of complainant was the application for insurance made on the 18th day of October, 1930, as alleged on page 2, lines 10 and 11 of defendant's answer?

INTERROGATORY NUMBER TWO:

When was the information of the accident described in paragraph IV of said answer communicated by defendant to complainant?

INTERROGATORY NUMBER THREE:

State the name, position held if known, of the officer, agent, servant, or employee of complainant to whom knowledge of the accident described in paragraph IV of the answer was communicated by defendant. [15]

INTERROGATORY NUMBER FOUR:

Where was said information conveyed to said person?

INTERROGATORY NUMBER FIVE:

Have any claims for money damages been made upon defendants by reason of the accident described in paragraph IV of said answer?

INTERROGATORY NUMBER SIX:

If so, state the names of the persons making such demands and the amounts claimed.

INTERROGATORY NUMBER SEVEN:

To what person was the application for the issuance of said policy first made by defendants?

INTERROGATORY NUMBER EIGHT:

Where was the said person when the application was made for the issuance of said policy by defendants?

INTERROGATORY NUMBER NINE:

State the date of payment and the person to whom the premium for said insurance was paid as alleged in paragraph VII of said answer.

INTERROGATORY NUMBER TEN:

For what reason or purpose was complainant requested to make said policy effective as of 12:01 o'clock A. M. on the 18th day of October, 1930? [16]

INTERROGATORY NUMBER ELEVEN:

State the position, if known, of the officer, agent, servant or employee to whom the application for said insurance was first made by defendant and the name of the person making such application on behalf of defendant.

GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainant.

[Endorsed]: Filed Dec. 24, 1930. [17]

[Title of Court and Cause.]

ANSWERS TO INTERROGATORIES PRO-
POUNDED BY COMPLAINANT TO DE-
FENDANTS UNDER EQUITY RULE
NUMBER FIFTY-EIGHT.

ANSWER TO INTERROGATORY NUMBER
ONE:

E. Mathias.

ANSWER TO INTERROGATORY NUMBER
TWO:

October 20th, 1930.

ANSWER TO INTERROGATORY NUMBER
THREE:

E. Mathias, agent.

ANSWER TO INTERROGATORY NUMBER
FOUR:

Stockton, California.

ANSWER TO INTERROGATORY NUMBER
FIVE:

Yes.

ANSWER TO INTERROGATORY NUMBER
SIX:

J. C. Benschoter, judgment for \$1000.00; Harold
Leslie, demand for \$25,000.00.

ANSWER TO INTERROGATORY NUMBER
SEVEN:

E. Mathias.

ANSWER TO INTERROGATORY NUMBER
EIGHT:

In his office at Stockton, California.

ANSWER TO INTERROGATORY NUMBER
NINE:

Paid on the third day of November, 1930, to E. Mathias.

ANSWER TO INTERROGATORY NUMBER
TEN:

Defendants placed their order for insurance on the morning of October 18th, 1930, and requested E. Mathias, agent, to make policy effective from time of order.

ANSWER TO INTERROGATORY NUMBER
ELEVEN:

Tom Strangio ordered insurance from E. Mathias, agent of complainant.

Dated this 9th day of April, 1931.

TOM STRANGIO,
For Defendants [18]

United States of America,
Northern District of California,
County of San Joaquin.—ss.

Tom Strangio, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing answers to interrogatories propounded by

complainant to defendants under equity rule number fifty-eight and knows the contents thereof; that the same are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

TOM STRANGIO.

Subscribed and sworn to before me this 9th day of April, 1931.

[Seal]

WARREN H. ATHERTON,
Notary Public in and for the County of San
Joaquin, State of California.

[Endorsed]: Filed Apr. 10, 1931. [19]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 28th day of September, in the year of our Lord one thousand nine hundred and thirty-one.

Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

The motions for leave to intervene came on to be heard and after argument, it is ordered that said motions be and the same are hereby granted. By consent, it is ordered that the motion for change of place of trial be and the same is hereby granted

and it is ordered that this cause be and the same is hereby transferred to the Southern Division of the United States Court, Northern District of California, for further proceedings. [20]

[Title of Court and Cause.]

COMPLAINT IN INTERVENTION.

Intervenor complains of complainant and for cause of action alleges:

I.

That on the 19th day of October, 1930, complainant in intervention was a passenger in an automobile proceeding on a public highway in the City of Stockton, State of California, in a southerly direction; that at said time one John A. Strangio was driving and operating an automobile then and there owned by the defendants, Fred Strangio and Tom Strangio, and was driving and operating same with their express permission; that the said John A. Strangio did so carelessly and negligently control and operate the said automobile which he was driving that same came into violent contact with the machine in which complainant in intervention was riding, violently throwing complainant in intervention therefrom and cutting off the right arm of complainant in intervention.

II.

That thereafter and on February 2nd, 1931, complainant in intervention commenced an action in the Superior Court of the County of San Joaquin, State of California, against John A. Strangio, Fred Strangio and Thomas Strangio and another person; that said defendants, Strangios, filed their answer denying their asserted negligence and the injuries to complainant in intervention, and that in said action a trial was had and thereafter on the 14th day of May, 1931, by its order duly made and given, said Superior Court in said action made and entered its certain judgment in words and figures as follows: [21]

“This cause came on regularly for hearing on the 14th day of May, 1931, as against the defendants John A. Strangio, Fred Strangio and Thomas Strangio, said action having been dismissed, without prejudice, as to defendant. J. C. Benschoter. Said action was tried by the Court, a jury having been waived, and the plaintiff and said defendants John A. Strangio, Fred Strangio and Thomas Strangio being represented in Court by their respective attorneys of record; evidence was introduced by and on behalf of said plaintiff and by and on behalf of said defendants John A. Strangio, Fred Strangio and Thomas Strangio, and the matter was then submitted by both parties to the Court. Whereupon, both plaintiff and the said defendants, by oral stipulation in open

Court, entered in the minutes, waived the making of findings of fact and conclusions of law,

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED that plaintiff Harold Leslie have and recover from defendant, John A. Strangio the sum of Ten Thousand Five Hundred Forty-seven and 95/100 (\$10,547.95), together with his costs of suit taxed at \$22.70, and that of said sum plaintiff have and recover from defendants Fred Strangio and Thomas Strangio the sum of Five Thousand Dollars (\$5,000.00); the obligation of this judgment is joint and several as to all of the said three defendants up to the sum of Five Thousand Dollars (\$5,000.00), and the excess thereof, to-wit: the sum of Five Thousand Five Hundred Forty-seven and 95/100 (\$5,547.95), and costs of suit, is recoverable only against said defendant, John A. Strangio.

Dated this 14th day of May, 1931.

M. G. WOODWARD,
Judge of the Superior Court."

III.

That defendants, John A. Strangio, Fred Strangio and Thomas Strangio, have not, nor has either of them paid the whole or any part of said judgment; that no motion for new trial or appeal has been taken from said judgment or any part thereof, and the same is now final. That a writ of execution has been issued on said judgment and

placed in the hands of the Sheriff of San Joaquin County, in which county defendants, John A. and Thomas Strangio, have resided at all times mentioned herein, and another writ directed to the Sheriff of Stanislaus County, where defendant, Fred Stangio, has resided at all times mentioned herein, and each of said sheriffs has returned said writ of execution wholly unsatisfied.

IV.

That at all times mentioned herein the complainant, Consolidated [22] Indemnity & Insurance Company was, and still is, a corporation organized and existing under and by virtue of the laws of the State of New York and had complied with all the laws of the State of California relating to insurance companies.

V.

That on the 21st day of October, 1930, said complainant corporation, pursuant to agreement made with it by Fred and Thomas Strangio, on October 18th, 1930, made, executed and delivered its certain policy of insurance dated October 18th, 1930, in and by its terms insuring said Fred and Thomas Strangio and every person lawfully operating their certain automobile, to-wit: A Studebaker Phaeton Big Six, motor No. 20488, against liability imposed by law upon said defendants Tom and Fred Strangio and any such person lawfully operating said automobile or either of them, because of the

damage caused to person or property by said automobile from and after October 18th, 1930, whether resulting from the ownership, use or maintenance of same. That said policy was numbered AL6240 and is the same policy which is referred to in the complaint in this action.

VI.

That in said policy said complainant corporation agreed as follows:

1. To insure the assured, against loss from the liability imposed by law upon the assured on account of bodily injuries, whether resulting fatally or not, suffered or alleged to have been suffered, within the policy period, by any person or persons by reason of the ownership, maintenance or use of said automobile.

2. To investigate accidents involving such injuries upon notice by assured and to negotiate all claims made, as may be deemed expedient, by complainant. [23]

3. To defend in the name and on behalf of the assured suits for damages, even if groundless, brought on account of such injuries, unless and until the complainant shall elect to effect settlement thereof.

4. To pay all costs taxed against the assured in any legal proceedings defended by the company, all accruing interest on judgment entered as a result thereof, all premium charges on attachment

or appeal bonds required in such legal proceedings, and all expenses incurred by the company for investigation, negotiation and defense.

5. To reimburse the assured for the expense incurred in providing such immediate surgical relief as imperative at the time of the accident.

6. To extend the insurance provided by the policy so as to be available in the same manner as to the named assured and under the same conditions to additional assureds not thereafter excepted.

7. To extend the insurance and to make payment as therein provided and in like manner to defend and investigate and to insure the assured against loss on account of the liability imposed by law upon the assured because of damage or destruction of property of every description (including the resultant loss of use of such property, but excepting property of the assured, or property rented or leased by the assured, or property in the custody of the assured and for which assured is legally responsible, or property carried in or upon any automobile of the assured), resulting from the ownership, use, maintenance of said automobile, including damage or destruction by fire.

That in said policy it is further provided in relation to injuries caused by the operation of said automobile, that if any person, or his legal representatives, shall obtain final [24] judgment against the assured because of any such injuries,

and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency, or any other cause, or if such judgment is not satisfied within thirty (30) days after it is rendered, then such person, or his legal representatives, may proceed against the company to recover the amount of such judgment, either at law, or in equity, but not exceeding the limit of said policy applicable thereto.

That in and by the terms of said policy, it was agreed that the complainant's liability under said policy to one or all of the assured in respect of said automobile was, as respects bodily injuries to and the death of one person, and should be in a sum not to exceed \$10,000 and, subject to the same limits for each person, the complainant's liability as respects bodily injuries or death of more than one person, was and should be in a sum not to exceed \$20,000, and that the complainant's liability for damage insured against in sub-paragraph 7 hereinabove set forth, for each accident, irrespective of the number of claimants, was and should be in a sum of not to exceed the sum of \$5,000.

VII.

That the automobile mentioned in said policy was the same automobile driven by said John A. Strangio at the time of the accident aforesaid; that said John A. Strangio was then and there duly licensed to operate said automobile under the laws of the State of California and was operating same

with the express consent of Fred and Thomas Strangio; that complainant in intervention is informed and believes, and on such information and belief alleges the fact to be that said Fred and Thomas Strangio have performed each and every, all and singular, the covenants and agreements in said policy of insurance on their, and each of their parts to be performed. [25]

VIII.

That in said policy it was provided that Fred and Thomas Strangio should pay as an annual premium the sum of \$82.80; that when said policy was issued it was agreed between the complainant corporation and said Fred and Thomas Strangio that the payment of said sum might be made within sixty days from and after the date of such issuance; that prior to the expiration of said period, to-wit: on or about October 29th, 1930, the complainant notified said Fred and Thomas Strangio that it repudiated said policy on the ground of alleged and pretended fraud and concealment as are more particularly referred to in the original complaint herein; that within a week thereafter said Fred and Thomas Strangio tendered to complainant herein the said sum of \$82.80 as such premium, but said complainant then and there refused to accept said sum and ever since said date has, and still continues to refuse to accept said premium; that ever since said date of tender as aforesaid Fred and Thomas Strangio have been ready, able

and willing to pay complainant said premium. That on the 24th day of November, 1930, an action was commenced against the said Fred and Thomas Strangio on account of damages for bodily injuries sustained by the plaintiff in said action in a collision occurring within the term of said policy, between a car described therein, to-wit: the car referred to in paragraph III of the original complaint herein, and the car in which plaintiff in said action was riding, and while the automobile described therein was being used with the knowledge and consent of said assureds for the purposes specified in said policy; that complainant failed and refused to defend in the name, or on behalf, of said assured, said action for damages and failed and refused to effect a settlement thereof. That by reason of complainant's said failure and refusal said Fred and Thomas Strangio then and there [26] suffered damage in an amount greatly in excess of said \$82.80, none of which has been repaid them.

IX.

Complainant in intervention avers that he is without knowledge as to the allegations in the complaint not herein expressly admitted or controverted and on this ground denies each and every one of such allegations.

WHEREFORE, complainant in intervention prays for judgment against the plaintiff corporation, Consolidated Indemnity & Insurance Company, in the sum of Ten Thousand Dollars

(\$10,000) and that it be further adjudged and decreed that the purported rescission of said policy referred to in the complaint in this action is null and void and said policy is in full force and effect.

NUTTER & RUTHERFORD,

A. P. HAYNE,

Attorneys for Complainant in Intervention.

United States of America,
Northern District of California,
County of San Joaquin.—ss.

A. P. Hayne, being first duly sworn, deposes and says: That he is one of the attorneys for the complainant in intervention in the foregoing entitled action; that said complainant in intervention is not at the present time within the County of San Joaquin, and affiant, therefore, makes this verification on his behalf; that affiant has read the foregoing complaint in intervention and knows the contents thereof; that the same is true of his own knowledge except as to such matters as are therein stated on his information and belief and as to those matters that he believes it to be true.

A. P. HAYNE.

Subscribed and sworn to before me this 25th day of August, 1931.

[Seal]

ALTA YATES,

Notary Public in and for the County of San Joaquin, State of California. [27]

AFFIDAVIT OF SERVICE BY MAIL.

State of California,
County of San Joaquin.—ss.

A. P. Hayne being sworn, deposes and says: That he is one of the attorneys of record for the above-named intervenor; that all the attorneys for said intervenor reside and have their offices in the City of Stockton, State of California; that Messrs. Glensor, Clewe & Van Dine are the attorneys of record for the above-named complainant and have their offices in the City and County of San Francisco, in said state, at the address hereinafter set forth; that in each of said two places there is a United States Postoffice, and between said two places there is a regular daily communication by United States mail; that on the 2nd day of October, 1931, deponent served the within complaint in intervention on said attorney for said complainant by depositing a copy thereof on said date, in the United States Postoffice in said City of Stockton properly inclosed in a sealed envelope and with the postage thereon fully prepaid, addressed to said attorney as follows:

Messrs. Glensor, Clewe & Van Dine, Attorneys
at Law,
Mills Building,
San Francisco, California.

A. P. HAYNE.

Subscribed and sworn to before me this 2nd day of October, 1931.

[Seal]

ALTA YATES,
Notary Public in and for the County of San
Joaquin, State of California.

Received a copy of the within this 2nd day of October, 1931.

WARREN H. ATHERTON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 3, 1931. [28]

[Title of Court and Cause.]

COMPLAINT IN INTERVENTION.

Intervenor complains of complainant and for cause of action alleges:

I.

That on the 19th day of October, 1930, complainant in intervention was a passenger in an automobile proceeding on a public highway in the City of Stockton, State of California, in a southerly direction; that at said time one John A. Strangio was driving and operating an automobile then and there owned by the defendants, Fred Strangio and Tom Strangio, and was driving and operating same with their express permission; that the said John A. Strangio did so carelessly and negligently control and operate the said automobile which he was driving that same came into violent contact with

the machine in which complainant in intervention was riding, violently throwing complainant in intervention therefrom and fracturing his skull and cutting and bruising him severely.

II.

That thereafter and on November 24th, 1930, complainant in intervention commenced an action in the Superior Court of the County of San Joaquin, State of California, against John [29] A. Strangio; that said defendant, Strangio, filed his answer denying his asserted negligence and the injuries to complainant in intervention, and that in said action a trial was had and thereafter on the 29th day of January, 1931, by its order duly made and given, said Superior Court in said action made and entered its certain judgment in words and figures as follows:

“This cause came on regularly to be heard before the Court, sitting without a jury, a jury having been expressly waived, and testimony was duly presented in open Court on the 29th day of January 1931 on behalf of Plaintiff and Defendants, in Department Two of the said Superior Court, Judge C. W. Miller presiding, and the matter submitted to the Court for its judgment and decision, and the Court having found in favor of the Plaintiff upon the issues raised;

It is therefore ordered, adjudged and decreed that Plaintiff have judgment against De-

defendant John A. Strangio in the sum of One Thousand Dollars (\$1,000.00) and costs of suit amounting to Twenty-two dollars (\$22.00).

Findings of Fact and Conclusions of Law in this matter were waived by Defendants in open Court.

Dated this 29th day of January, 1931.

C. W. MILLER,
Judge of the Superior Court.”

III.

That defendant, John A. Strangio, has not paid the whole or any part of said judgment; that no motion for new trial or appeal has been taken from said judgment or any part thereof, and the same is now final. That a writ of execution has been issued on said judgment and placed in the hands of the Sheriff of San Joaquin County, in which County defendant, John A. Strangio, has resided at all times mentioned herein, and said Sheriff has returned said writ of execution wholly unsatisfied.

IV.

That at all times mentioned herein the complainant, Consolidated Indemnity & Insurance Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of New York and had complied with all the [30] laws of the State of California relating to insurance companies.

V.

That on the 21st day of October, 1930, said complainant corporation, pursuant to agreement made with it by Fred and Thomas Strangio, on October 18th, 1930, made, executed and delivered its certain policy of insurance dated October 18th, 1930, in and by its terms insuring said Fred and Thomas Strangio and every person lawfully operating their certain automobile, to-wit: A Studebaker Phaeton Big-6, Motor No. 20488, against liability imposed by law upon said defendants Tom and Fred Strangio and any such person lawfully operating said automobile because of the damage caused to person or property by said automobile whether resulting from the ownership, use or maintenance of same. That said policy was numbered AL6240 and is the same policy which is referred to in the complaint in this action.

VI.

That in said policy said complainant corporation agreed as follows:

1. To insure the assured against loss from the liability imposed by law upon the assured on account of bodily injuries whether resulting fatally or not, suffered or alleged to have been suffered, within the policy period, by any person or persons by reason of the ownership, maintenance or use of said automobile.

2. To investigate accidents involving such injuries upon notice by assured and to negotiate all

claims made, as may be deemed expedient, by complainant.

3. To defendant in the name and on behalf of the assured suits for damages, even if groundless, brought on account of such injuries, unless and until the complainant shall elect to effect settlement thereof. [31]

4. To pay all costs taxed against the assured in any legal proceedings defended by the company, all accruing interest on judgment entered as a result thereof, all premium charges on attachment or appeal bonds required in such legal proceedings, and all expenses incurred by the company for investigation, negotiation and defense.

5. To reimburse the assured for the expense incurred in providing such immediate surgical relief as imperative at the time of the accident.

6. To extend the insurance provided by the policy so as to be available in the same manner as to the named assured and under the same conditions to additional assureds not thereafter excepted.

7. To extend the insurance and to make payment as therein provided and in like manner to defend and investigate and to insure the assured against loss on account of the liability imposed by law upon the assured because of damage or destruction of property of every description (including the resultant loss of use of such property, but excepting property of the assured, or property in the custody of the assured and for which assured is

legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use, maintenance of said automobile, including damage or destruction by fire.

That in and by the terms of said policy, it was agreed that the complainant's liability under said policy to one or all of the assured in respect of said automobile was, as respects bodily injuries to and the death of one person, and should be in a sum not to exceed \$10,000, and subject to the same limits for each person, the complainant's liability as respects bodily injuries or death of more than one person, was and should be in a sum not to exceed \$20,000.00, and that the complainant's liability for damage insured against in sub- [32] paragraph 7 hereinabove set forth, for each accident, irrespective of the number of claimants, was and should be in a sum not to exceed the sum of \$5,000.

VII.

That the automobile mentioned in said policy was the same automobile driven by said John A. Strangio at the time of the accident aforesaid; that said John A. Strangio was then and there duly licensed to operate said automobile under the laws of the State of California and was operating same with the express consent of Fred and Thomas Strangio; that complainant in intervention is informed and believes, and on such information and belief alleges the fact to be that said Fred and Thomas Strangio have performed each and every, all and singular,

the covenants and agreements in said policy of insurance on their, and each of their parts to be performed.

VIII.

That in said policy it was provided that Fred and Thomas Strangio should pay as an annual premium the sum of \$82.80; that when said policy was issued it was agreed between the complainant corporation and said Fred and Thomas Strangio that the payment of said sum might be made within sixty days from and after the date of such issuance; that prior to the expiration of said period, to-wit; on or about October 29th, 1930, the complainant notified said Fred and Thomas Strangio that it repudiated said policy on the ground of alleged and pretended fraud and concealment as are more particularly referred to in the original complaint herein; that within a week thereafter said Fred and Thomas Strangio tendered to complainant herein the said sum of \$82.80 as such premium, but said complainant then and there refused to accept said sum and ever since said date has, and still continues to refuse to accept said premium; that ever since said date of tender as aforesaid said Fred and [33] Thomas Strangio have been ready, able and willing to pay complainant said premium. That on the 24th day of November, 1930, an action was commenced against the said Fred and Thomas Strangio on account of damages for bodily injuries sustained by the plaintiff in said action in a col-

lision occurring within the terms om said policy, between a car described therein, to-wit: the car referred to in paragraph III of the original complaint herein, and the car in which plaintiff in said action was riding, and while the automobile described therein was being used with the knowledge and consent of said assureds for the purposes specified in said policy; that complainant failed and refused to defend in the name, or on behalf of said assured, said action for damages and failed and refused to effect a settlement thereof. That by reason of complainant's said failure and refusal said Fred and Thomas Strangio then and there suffered damage in an amount greatly in excess of said \$82.80, none of which has been repaid them.

IX.

Complainant in intervention avers that he is without knowledge as to the allegations in the complaint not herein expressly admitted or controverted, and on this ground denies each and every one of such allegations.

WHEREFORE complainant in intervention prays for judgment against the plaintiff corporation, Consolidated Indemnity & Insurance Company, in the sum of One Thousand and Twenty-two Dollars (\$1022.00) and that it be further adjudged and decreed that the purported rescission of said policy referred to in the complaint in this action

is null and void and said policy is in full force and effect.

SYDNEY W. BENNETT,
Attorney for Complainant in
Intervention. [34]

State of California,
County of San Joaquin.—ss.

JAMES C. BENSCHOTER, being first duly sworn, deposes and says:

That he is the complainant in intervention named in the foregoing entitled action; that he has read the foregoing Complaint in Intervention and knows the contents thereof; that the same is true of his own knowledge except as to such matters as are therein stated on his information and belief and as to those matters that he believes it to be true.

J. C. BENSCHOTER.

Subscribed and sworn to before me this 10th day of October, 1931.

[Seal]

SYDNEY W. BENNETT,
Notary Public in and for the County of
San Joaquin, State of California.

[Endorsed]: Filed, Oct. 14, 1931. [35]

[Title of Court and Cause.]

ANSWER OF THE COMPLAINANT TO THE
COMPLAINT IN INTERVENTION OF
HAROLD LESLIE.

Comes now Consolidated Indemnity and Insurance Company, a corporation, complainant above named, and answers the complaint in intervention of Intervenor, Harold Leslie, as follows:

I.

Answering unto paragraph I of said complaint in intervention, complainant alleges that it has no knowledge or information upon the subject sufficient to enable it to form a belief and for that reason and placing its denials upon that ground, denies that on the 19th day of October, 1930, and at the time of the occurrence of the accident in said paragraph I set forth, John A. Strangio was driving or operating the automobile therein alleged, or any automobile, then or there owned by defendants Fred Strangio or Tom Strangio or either of them, or that said John A. Strangio was driving or operating said or any automobile with the express permission of said Fred Strangio and Tom Strangio, or the permission of said Fred Strangio or Tom Strangio. And for the same reason, [36] and basing its denial upon the same ground, denies that the said John Strangio did carelessly or negligently control or operate the said automobile which he was driving, or any automobile, so that the same came

into violent or any contact with the machine in which complainant in intervention was riding.

II.

Answering unto paragraph III of said complaint in intervention, complainant alleges that it has no knowledge or information upon the subject sufficient to enable it to form a belief, and for that reason and placing its denial upon that ground, denies that defendant John A. Strangio, or Fred Strangio or Tom Strangio have not, nor has either or any of them paid the whole or any part of said judgment.

III.

Answering unto paragraph V of said complaint in intervention, answering complainant denies that on the 21st day of October, 1930, it made, executed and delivered its or any policy of insurance pursuant to request of Fred or Thomas Strangio or either of them on October 18th, 1930, but on the contrary complainant alleges the fact to be that, pursuant to a request of Fred and Thomas Strangio made to complainant on the 21st day of October, 1930, and deceived and misled by the concealment hereinafter set forth, complainant on the said 21st day of October, 1930, issued an alleged and pretended policy of insurance Number AL-6240 in favor of defendants as assured therein, and at the request of said Fred and Tom Strangio made said purported and pretended policy effective as of 12:01

o'clock A. M. on the 18th day of October, 1930, for a policy period of 12 calendar months beginning on the said 18th day of October, 1930, and ending on the 18th day of October, 1931, at 12 o'clock A. M., as to both dates Standard Time. [37]

IV.

Answering unto paragraph VI of said complaint in intervention, complainant denies "that in said policy it is further provided in relation to injuries caused by the operation of said automobile, that if any person, or his legal representatives, shall obtain final judgment against the assured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty (30) days after it is rendered, then such person or his legal representatives, may proceed against the company to recover the amount of such judgment, either at law, or in equity, but not exceeding the limit of said policy applicable thereto."

V.

Answering unto paragraph VII of said complaint in intervention, complainant alleges that it has no knowledge or information upon the subject, sufficient to enable it to form a belief, and for that reason, and placing its denials upon that ground, denies that the automobile mentioned in said policy was the same automobile driven by said John A.

Strangio at the time of the accident mentioned in said complaint in intervention, or that said John A. Strangio was then and there duly licensed or licensed at all to operate said automobile under the laws of the State of California, or was operating the same with the express consent of Fred or Thomas Strangio or either or both of them; and for the same reason and placing its denials upon the same ground denies that Fred or Thomas Strangio, or either of them, had performed each and every, or each or every, all and singular, or all or singular, the covenants and/or agreements in said alleged policy of insurance on their or each of their parts to be performed, or [38] haved performed, any of the covenants or agreements in said policy of insurance at all.

VI.

Answering unto paragraph VIII of said complaint in intervention, complainant denies that it was agreed between the complainant corporation and said Fred and Thomas Strangio, or either of them, that the payment of the premium upon such alleged policy might be made within sixty days from and after the date of such issuance and on the contrary, complainant alleges the facts to be that said premium was payable immediately; denies that said Fred or Thomas Strangio or either of them, or both of them, tendered to complainant herein the said sum of \$82.80 as such premium at any time or at all; alleges that it has no knowledge or information on

the subject sufficient to enable it to form a belief and for that reason, and placing its denials upon that ground, denies that ever since the date of said alleged tender, said Fred or Thomas Strangio or either or both of them have been ready or able or willing to pay complainant said premium; denies that at the time of the occurrence of the accident set forth in complainant's complaint on file herein and in said complaint in intervention, the automobile described therein was being used with the knowledge or consent of the assured, or for the purposes specified in said policy.

Further answering said complaint in intervention, and as a first separate and special defense thereto, complainant alleges:

I.

That on the 21st day of October, 1930, defendants above named applied to complainant above named for the issuance of a policy of insurance insuring defendants against [39] loss from the liability imposed by law upon said defendants on account of bodily injury, whether resulting fatally or not, suffered or alleged to have been suffered within the policy period, by any person or persons by reason of the ownership, maintenance or use of a certain automobile, to-wit: a Studebaker Phaeton Big Six, 1926 model, factory motor number 20488 (hereinafter for convenience referred to as "said automo-

bile'') and agreeing on the part of complainant to do certain things in connection with said insurance more specifically hereinafter set forth, and to make payment, defend, investigate and to insure said defendants against loss on account of the liability imposed by law upon the said defendants because of the damage to or destruction of property of every description (including the resulting loss of use of such property but excepting property of the assured or property rented or leased by the assured, or property in the custody of the assured, and for which the assured was or is legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use or maintenance of said automobile, including damage or destruction by fire.

That at the time of applying for said insurance on the said 21st day of October, 1930, the said defendants requested complainant to issue said policy effected as of 12:01 o'clock A. M. on the 18th day of October, 1930, and to make the policy period of said policy for twelve (12) calendar months beginning on the said 18th day of October and ending on the 18th day of October, 1931, at 12:01 o'clock A. M. as to both dates Standard Time.

II.

That pursuant to said request and deceived and misled by the concealment hereinafter mentioned and set forth, complainant did, on the 21st day of October, 1930, issue its [40] policy of insurance

No. AL-6240 in favor of defendants as assured therein, wherein and whereby complainant did purport to agree as alleged in the complaint on file herein and as alleged in the complaint in intervention of said Harod Leslie, save and except as the allegations of said complaint respecting the contents of the said insurance policy have been hereinbefore expressly denied.

III.

That complainant was induced to issue said policy by the fraud, deceit and concealment of defendants in the following particulars:

That on the 19th day of October, 1930, while said automobile was being operated upon a public street or highway in the City of Stockton, County of San Joaquin, State of California, it came into collision with great force and violence with an automobile then and there operated by one J. C. Benschoter, whereby the said automobile of said Benschoter suffered damage and whereby said Harold Leslie, who was then and there a passenger in the said automobile operated by said Benschoter, received bodily injuries which caused and resulted, among other things, in the amputation of said Leslie's right arm.

IV.

That all of the facts, matters and things set forth in paragraph III hereof, to-wit: the said collision on the said 19th day of October, 1930, the damage

and injury to said Leslie, and the damage and injury to the property of said Benschoter, were all known to defendant and were unknown to complainant on the said 21st day of October, 1930, when said policy was issued, and were concealed by said defendants from complainant and were not communicated to complainant, nor was complainant advised thereof in any manner or to any [41] extent whatsoever. That had the said defendants communicated said facts to complainant at any time before the issuance of said policy, the complainant would not have issued said policy.

WHEREFORE, complainant prays the judgment and decree of this Court adjudging that Intervenor take nothing by his complaint in intervention; further adjudging that the said policy and the issuance thereof was procured by fraud and concealment; adjudging and decreeing that the said policy is null and void and of no force or effect, and rescinding, annulling and cancelling the same, and for such other and further relief as to the Court may seem just and is meet and agreeable to equity.

And complainant will ever pray, etc.

GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainant. [42]

State and Northern District of California,
City and County of San Francisco.—ss.

H. W. GLENSOR, being first duly sworn, deposes and says:

That he is one of the solicitors for complainant in the above entitled cause; that the said complainant has no officer in the City and County of San Francisco or the Northern District of California, in which City and County and District affiant has his offices, at the time this verification is made, and affiant therefore makes this verification on its behalf; that he has read the foregoing Answer to the Complaint in Intervention of Harold Leslie, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

H. W. GLENSOR.

Subscribed and sworn to before me this 21st day of October, 1931.

[Notarial Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County
of San Francisco, State of California.

[Endorsed]: Filed Oct. 22, 1931. [43]

[Title of Court and Cause.]

ANSWER OF THE COMPLAINANT TO THE
COMPLAINT IN INTERVENTION OF
JAMES C. BENSCHOTER.

Comes now Consolidated Indemnity and Insurance Company, a corporation, complainant above.

named and answers the complaint in intervention of Intervenor James C. Benschoter, as follows:

I.

Answering unto paragraph I of said complaint in intervention, complainant alleges that it has no knowledge or information upon the subject sufficient to enable it to form a belief and for that reason and placing its denials upon that ground, denies that on the 19th day of October, 1930, and at the time of the occurrence of the accident in said paragraph I set forth, John A. Strangio was driving or operating the automobile therein alleged, or any automobile, then or there owned by defendants Fred Strangio or Tom Strangio, or either of them, or that said John A. Strangio was driving or operating said or any automobile with the express permission of said [44] Fred Strangio and Tom Strangio, or the permission of said Fred Strangio or Tom Strangio. And for the same reason and basing its denial upon the same ground, denies that the said John Strangio did carelessly or negligently control or operate the said automobile which he was driving, or any automobile, so that the same came into violent or any contact with the machine in which complainant in intervention was riding.

II.

Answering unto paragraph III of said complaint in intervention, complainant alleges that it has no knowledge or information upon the subject sufficient

to enable it to form a belief, and for that reason and placing its denial upon that ground, denies that defendant John A. Strangio has not paid the whole or any part of said judgment.

III.

Answering unto paragraph V of said complaint in intervention, answering complainant denies that on the 21st day of October, 1930, it made, executed and delivered its or any policy of insurance pursuant to request of Fred or Thomas Strangio or either of them on October 18th, 1930, but on the contrary complainant alleges the fact to be that, pursuant to a request of Fred and Thomas Strangio made to complainant on the 21st day of October, 1930, and deceived and misled by the concealment hereinafter set forth, complainant on the said 21st day of October, 1930, issued an alleged and pretended policy of insurance Number AL-6240 in favor of defendants as assured therein, and at the request of said Fred and Tom Strangio made said purported and pretended policy effective as of 12:01 o'clock A. M. on the 18th day of October, 1930, for a policy period of 12 calendar months beginning on the said 18th day of October, 1930, and ending on the 18th day of October, 1931, at 12 o'clock A. M. as to both dates Standard Time. [45]

IV.

Answering unto paragraph VII of said complaint in intervention, complainant alleges that it has no

knowledge or information upon the subject, sufficient to enable it to form a belief, and for that reason, and placing its denials upon that ground, denies that the automobile mentioned in said policy was the same automobile driven by said John A. Strangio at the time of the accident mentioned in said complaint in intervention, or that said John A. Strangio was then and there duly licensed or licensed at all to operate said automobile under the laws of the State of California, or was operating the same with the express consent of Fred or Thomas Strangio or either or both of them; and for the same reason and placing its denials upon the same ground denies that Fred or Thomas Strangio, or either of them, had performed each and every, or each or every, all and singular, or all or singular, the covenants and/or agreements in said alleged policy of insurance on their or each of their parts to be performed, or have performed any of the covenants or agreements in said policy of insurance at all.

V.

Answering unto paragraph VIII of said complaint in intervention, complainant denies that it was agreed between the complainant corporation and said Fred and Thomas Strangio, or either of them, that the payment of the premium upon such alleged policy might be made within sixty days from and after the date of such issuance and on the contrary, complainant alleges the fact to be that said

premium was payable immediately; denies that said Fred or Thomas Strangio or either of them, or both of them, tendered to complainant herein the said sum of \$82.80 as such premium at any time or at all; alleges that it has no knowledge or information on the subject suffi- [46] cient to enable it to form a belief and for that reason and placing its denials upon that ground, denies that ever since the date of said alleged tender, said Fred or Thomas Strangio, or either or both of them, have been ready to or able or willing to pay complainant said premium; denies that at the time of the occurrence of the accident set forth in complainant's complaint on file herein and in said complaint in intervention, the automobile described therein was being used with the knowledge or consent of the assured, and for the purposes specified in said policy.

* * * * *

Further answering said complaint in intervention, and as a first separate and special defense thereto, complainant alleges:

I.

That on the 21st day of October, 1930, defendants above named applied to complainant above named for the issuance of a policy of insurance insuring defendants against loss from the liability imposed by law upon said defendants on account of bodily injury, whether resulting fatally or not, suffered or alleged to have been suffered within the policy period, by any person or persons by reason

of the ownership, maintenance or use of a certain automobile, to-wit: a Studebaker Phaeton Big Six, 1926 model, factory motor number 20488 (hereinafter for convenience referred to as "said automobile") and agreeing on the part of complainant to do certain things in connection with said insurance more specifically hereinafter set forth, and to make payment, defend, investigate and to insure said defendants against loss on account of the liability imposed by law upon the said defendants because of the damage to or destruction of property of every description (including the resulting loss of use of such property, but excepting [47] property of the assured or property rented or leased by the assured, or property in the custody of the assured, and for which the assured was or is legally responsible, or property carried in or upon any automobile of the assured) resulting from the ownership, use or maintenance of said automobile, including damage or destruction by fire.

That at the time of applying for said insurance on the said 21st day of October, 1930, the said defendants requested complainant to issue said policy effective as of 12:01 o'clock A. M. on the 18th day of October, 1930, and to make the policy period of said policy for twelve (12) calendar months beginning on the said 18th day of October and ending on the 18th day of October, 1931, at 12:01 o'clock A. M. as to both dates Standard Time.

II.

That pursuant to said request and deceived and misled by the concealment hereinafter mentioned and set forth, complainant did, on the 21st day of October, 1930, issue its policy of insurance No. AL-6240 in favor of defendants as assured therein, wherein and whereby complainants did purport to agree as alleged in the complaint on file herein and as alleged in the complaint in intervention of said James C. Benschoter, save and except as the allegations of said complaint respecting the contents of the said insurance policy have been hereinbefore expressly denied.

III.

That complainant was induced to issue said policy by the fraud, deceit and concealment of defendants in the following particulars:

That on the 19th day of October, 1930, while said automobile was being operated upon a public street or highway in the City of Stockton, County of San Joaquin, State of [48] California, it came into collision with great force and violence with an automobile then and there operated by one J. C. Benschoter, whereby the said automobile of said Benschoter suffered damage and whereby said Harold Leslie, who was then and there a passenger in the said automobile operated by said Benschoter received bodily injuries which caused and resulted, among other things, in the amputation of said Leslie's right arm.

IV.

That all of the facts, matters and things set forth in paragraph III hereof, to-wit: the said collision on the said 19th day of October, 1930, the damage and injury to said Leslie, and the damage and injury to the property of said Benschoter, were all known to defendants and were unknown to complainant on the said 21st day of October, 1930, when said policy was issued, and were concealed by said defendants from complainant and were not communicated to complainant, nor was complainant advised thereof in any manner or to any extent whatsoever. That had the said defendants communicated said facts to complainant at any time before the issuance of said policy, the complainant would not have issued said policy.

Further answering said complaint in intervention, and as a second separate and special defense thereto, complainant alleges that the Court has no jurisdiction of the subject matter of said complaint in intervention.

WHEREFORE, complainant prays the judgment and decree of this Court adjudging that Intervenor take nothing by his complaint in intervention; further adjudging that the said policy and the issuance thereof was procured by fraud and concealment; adjudging and decreeing that the said policy is null and void and of no force or effect, and

rescinding, annulling [49] and cancelling the same, and for such other and further relief as to the Court may seem just and is meet and agreeable to equity.

And complainant will ever pray, etc.

GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainant.

State and Northern District of California,
City and County of San Francisco.—ss.

H. W. GLENSOR, being first duly sworn, deposes and says:

That he is one of the solicitors for complainant in the above entitled cause; that the said complainant has no officer in the City and County of San Francisco or the Northern District of California, in which City and County and District affiant has his offices, at the time this verification is made, and affiant therefore makes this verification on its behalf; that he has read the foregoing Answer to the Complaint in Intervention of James C. Benschoter, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

H. W. GLENSOR.

Subscribed and sworn to before me this 21st day of October, 1931.

[Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County
of San Francisco, State and Northern Dis-
trict of California.

[Endorsed]: Filed Oct. 22, 1931. [50]

In the Southern Division of the United States Dis-
trict Court, for the Northern District of California.

No. 3040-L

CONSOLIDATED INDEMNITY AND INSUR-
ANCE COMPANY, a Corporation,
Complainant,

vs.

FRED STRANGIO and TOM STRANGIO, doing
business as Strangio Bros.,

Defendants,

HAROLD LESLIE and JAMES C.

BENSCHOTER,

Intervenors.

FINDINGS AND DECREE.

The above entitled cause came on regularly for hearing before the Court on the 31st day of March, 1932, upon the complaint of complainant the answer of Fred Strangio and Tom Strangio, doing busi-

ness as Strangio Bros., defendants, the complaint in intervention of James C. Benschoter, the answer of complainant thereto, the complaint in intervention of Harold Leslie and the answer of complainant thereto. Complainant, Consolidated Indemnity and Insurance Company was represented by the firm of Glensor, Clewe, Schofield & Van Dine, its solicitors, H. W. Glensor appearing, the defendants Fred Strangio and Tom Strangio were represented by Mr. Warren H. Atherton, their solicitor, intervenor James C. Benschoter was represented by Mr. Sydney C. Bennett, his solicitor, intervenor Harold Leslie was represented by Messrs. Nutter & Rutherford, and A. P. Hayne, his solicitors, A. P. Hayne appearing. Evidence oral and documentary was [51] offered and received and the said cause submitted to the Court for consideration and decision and all and singular the law and premises having been fully heard, understood and considered, the Court now makes the following findings a fact:

1. That all the allegations of complainant's complaint are true.

2. With respect to the allegation of the answer of defendants and the denial therein contained the Court finds that it is not true that defendant applied to complainant on the 18th day of October, 1930, for issuance of the policy of insurance mentioned in said complaint and in said answer but that defendant applied to complainant on the 21st day of October, 1930, for issuance of said policy.

3. With respect to paragraph III of said answer the Court finds that said policy of insurance AL-6240 was issued on the 21st day of October, 1930

4. The Court finds that it is true that complainant was induced to issue said policy by *defraud* and/or *deceit* and/or *concealment* of defendant with respect to a collision with an automobile being operated by one James C. Benschoter, which said accident occurred on the 19th day of October, 1930, and that it is true that defendant issued said policy by reason of said *fraud* and/or *deceit* and/or *concealment* of defendant.

5. With respect to the denials and allegations of paragraph VI of said answer the Court finds that complainant first learned of said *concealment* and of the facts, matters and things with reference to the collision of said automobile with the automobile operated by James C. Benschoter on or about the 25th of October, 1930, that it is not true that complainant learned of said facts, matters and things connected with said collision on or about the 19th day of October, 1930. [52]

6. The Court finds that no premium has been paid upon said policy and that it is not true that premium has been fully paid and has been retained by complainant and has not been tendered to or returned to defendant.

7. With respect to the allegations of the complaint and intervention of the intervenor Harold Leslie, the Court finds that on the 19th day of Oc-

tober, 1930, said Harold Leslie was a passenger in an automobile proceeding on a public highway in the City of Stockton, State of California, that at said time John A. Strangio was driving and operating an automobile then and there owned by the defendants Fred Strangio and Tom Strangio and was driving and operating the same with their express permission; that the said automobile which said John A. Strangio was driving came into violent contact with the machine in which complainant in intervention, Harold Leslie, was riding, violently throwing complainant in intervention therefrom and cutting off the right arm of said complainant Harold Leslie.

8. That the allegations of paragraph II, III and IV of said complaint in intervention are true.

9. That the allegations of paragraph V of said complaint in intervention are true save and except that the request for the issuance of said policy was made on the 21st day of October, 1930, and not on the 18th day of October, 1930.

10. That the allegations of paragraph VI of said complaint in intervention are true.

11. That it is not true that said Fred and Tom Strangio had performed each and every, all and singular the covenants and agreements in the said policy of insurance on their and each of their parts to be performed.

12. That the allegations of paragraph VIII of said [53] complaint in intervention are not true,

save and except that it is true that said Fred and Tom Strangio tendered to complainant herein the sum of Eighty-two and 80/100 Dollars (\$82.80) as premium on said policy but said complainant then and there refused to accept said sum and it is true that ever since that date the said complainant still continues to refuse to accept said premium, and it is true that ever since that date said Fred and Tom Strangio have been ready, able and willing to pay complainant said premium.

13. With respect to the allegations and denials of the complainant in intervention of James C. Benschoter, the Court finds that on the 19th day of October, 1930, said complainant in intervention James C. Benschoter was a passenger in an automobile proceeding on a public highway in the city of Stockton, State of California, that at said time one John A. Strangio was driving and operating an automobile then and there owned by the defendants Fred Strangio and Tom Strangio, and was driving same with their express permission; that the said automobile so operated by John A. Strangio came in violent contact with a machine in which said James C. Benschoter was riding, violently throwing complainant in intervention, James C. Benschoter, therefrom and fracturing his skull and cutting and bruising him severely.

14. That the allegations of paragraph II, III and IV of said complaint in intervention are true.

15. That the allegations of paragraph V of said complaint in intervention are true save and except that the request of Fred and Tom Strangio for the issuance of the said policy of insurance was made to complainant on the 21st day of October, 1930 and not on the 18th day of October, 1930.

16. That the allegations of paragraph VI of said complaint in intervention are true save and except that it [54] is not true that said Fred and Tom Strangio had performed each and every, all and singular the covenants and agreements of said policy of insurance on their and each of their parts to be performed.

17. That the allegations of paragraph VIII of said Complaint in Intervention are not true save and except that it is true that said Fred and Tom Strangio tendered to complainant the sum of Eighty Two and 80/100 Dollars (\$82.80) as premium on said policy, that said complainant refused to accept said sum and ever since said tender has and still continues to refuse to accept said premium and it is true that ever since that date said Fred and Tom Strangio have been ready, able and willing to pay complainant said premium.

From the foregoing findings of fact the Court makes the following conclusions of law:

1. That issuance of the said policy of insurance No. AL 6240, on the 21st day of October, 1930, was procured and induced through the fraud and concealment of defendants with respect of the accident

occurring on the 19th day of October, 1930, and the concealment of the liability imposed upon defendant by reason of said accident which said liability said policy purported to cover.

2. That complainant is entitled to a decree adjudging that the said policy and the issuance thereof was procured by fraud and concealment, and adjudging and decreeing that said policy is null and void and of no force or effect and rescinding, annulling and cancelling the same and ordering and directing the said defendant to surrender the said policy to complainant and for costs.

Let a decree be entered accordingly.

Dated, Aug. 25th, 1932.

HAROLD LOUDERBACK,

Judge. [55]

In the Southern Division of the United States
District Court, for the Northern District of
California.

No. 3040-L

CONSOLIDATED INDEMNITY AND INSUR-
ANCE COMPANY, a Corporation,

Complainant,

vs.

FRED STRANGIO and TOM STRANGIO, doing
business as Strangio Bros.,

Defendants,

HAROLD LESLIE and JAMES C.

BENSCHOTER,

Intervenors.

DECREE.

This cause came on to be heard at this term, was submitted to the Court upon briefs of counsel and thereupon upon consideration thereof the Court made and entered its findings of fact and conclusions of law and upon consideration and upon said findings of fact and conclusions of law, it is ordered, adjudged and decreed as follows: That certain policy of insurance No. AL 6240, issued by Consolidated Indemnity & Insurance Company, a corporation, complainant herein, purporting to insure Fred Strangio and Tom Strangio, and bearing date the 18th day of October, 1930, and the issuance thereof was procured by fraud and concealment. It is further adjudged and decreed that said policy is

null, void and of no force or effect and it is hereby rescinded, annulled and cancelled. The said defendants, Fred Strangio and Tom Strangio, individually and doing business as Strangio [56] Bros., are hereby ordered and directed to surrender said policy to the clerk of this Court, the said clerk is directed to note the entry of this decree thereon and to mark said policy cancelled and annulled and to deliver the said policy to the solicitors for complainant. It is ordered, adjudged and decreed that the Complaint in Intervention of James C. Benschoter and the Complaint in Intervention of Harold Leslie be and the same is hereby dismissed and that said James C. Benschoter and Harold Leslie take nothing by their said complaints. It is further ordered, adjudged and decreed that the complainant herein have judgment for its costs. It is further ordered, adjudged and decreed that in the event any claims are made or asserted or rights claimed or asserted under or by virtue of said policy by the said defendants or by James C. Benschoter, intervenor, or Harold Leslie, intervenor, hereafter the complainant herein may apply to the Court for an order for a permanent injunction restraining the assertion of said rights, claims or demands by the said defendants or intervenors or either of or any of them.

Done in open court this 25th day of August, 1932.

HAROLD LOUDERBACK,
United States District Judge. [57]

AFFIDAVIT OF SERVICE.

State of California,
City and County of San Francisco.—ss.

M. L. HUNTER, being first duly sworn, deposes and says:

That at all times herein mentioned she was and now is a citizen of the United States over the age of twenty-one (21) years, competent to be a witness herein, and not a party to nor interested in the above entitled action;

That on August 3rd, 1932, she personally served a full, true and correct copy of the hereunto annexed Findings and Decree upon each of the following: Warren H. Atherton, Sidney C. Bennett and A. P. Hayne, by placing one copy of said Findings and Decree in a sealed envelope addressed as follows:

WARREN H. ATHERTON,
Attorney at Law,
Bank of America Building,
Stockton, California,

by placing one copy of said findings and decree in a sealed envelope addressed as follows:

SIDNEY C. BENNETT,
Attorney at Law,
Bank of America Building,
Stockton, California,

and by placing one copy of said findings and decree in a sealed envelope addressed as follows:

A. P. HAYNE,
Attorney at Law,
Stockton Savings & Loan Bank Building,
Stockton, California,

into the United States post-office, with postage thereon fully prepaid.

Said Warren H. Atherton, Sidney C. Bennett and A. P. Hayne have their offices in the City of Stockton, State of California, at the addresses above mentioned, and Messrs. [58] Glensor, Clewe, Schofield & Van Dine have their offices in the City and County of San Francisco, State of California.

There is a daily communication by mail between the said City of Stockton, State of California, and the said City of San Francisco, State of California.

M. L. HUNTER.

Subscribed and sworn to before me this 11th day of August, 1932.

[Seal] DOROTHY H. McLENNAN,
Notary Public

In and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Aug. 25, 1932. [59]

[Title of Court and Cause.]

NARRATIVE OF EVIDENCE PREPARED
PURSUANT TO EQUITY RULE 75.

On Tuesday, March 29th, 1932, the above entitled action was called for trial before the Southern Division of the United States District Court, Northern District of California, Honorable Harold Louderback, Judge presiding. The respective parties were represented by the following solicitors:

For the complainant, H. W. Glensor;

For the defendants, W. H. Atherton;

For the intervenor, Harold Leslie, A. P. Hayne;

For the intervenor, James C. Benschoter, Sidney C. Bennett.

Before proceeding, Attorney Hayne, on behalf of Harold Leslie, asked that the complaint in intervention be amended on its face in paragraph V, line 2, by striking out the words, "request of," which immediately follows the words, "pursuant to" in said line, and substituting the words, "agreement made with it by".

Attorney Bennett, on behalf of Intervenor, Benschoter, moved to amend the corresponding part in the latter's complaint in intervention. It was stipulated by all parties that said amendment might be made and would be deemed denied, and it was so ordered by the Court. [60]

Attorney Glensor on behalf of the complainant then made his opening statement in which he stated that the suit was in equity to cancel a public lia-

bility policy of insurance upon the ground that its issuance was obtained by concealment. He stated that the facts would be without serious dispute. That the complainant, a New York corporation, had a San Francisco office at the time the policy was written. That it had an arrangement with the Netherlands Insurance Company whereby the Netherlands Insurance Company placed with it, or offered to it, certain lines of insurance which the Netherlands Insurance Company did not write, notably public liability; on such business as it accepted from the Netherlands Insurance Company it paid that company as a broker. He stated that the Netherlands Insurance Company acted as a broker. That on Saturday, October 18th, 1930, the defendants Strangio Bros., through some arrangements made with one Mathias at Stockton, placed an order for public liability insurance on three automobiles. Mathias was neither a licensed agent or broker. That Mathias made out the application to the Netherlands Saturday night, October 18th, and mailed it Sunday morning, October 19th. This was received on Monday, October 20th, by the Netherlands, who telephoned the application to the complainant's office in San Francisco, which company on the 21st issued the policy sought to be cancelled and forwarded it, through the Netherlands Insurance Company and Mr. Mathias at Stockton. That on Sunday, October 19th, one of the insured automobiles was loaned by Strangio Bros. to another brother, not a member of the firm, and while driven

by this brother was involved in the accident injuring the two intervenors who subsequently recovered judgments against Strangio Bros. as follows: Mr. Benschoter for \$1,000.00, and Mr. Leslie for \$10,000.00. Some time on Sunday, one of the [61] assured Strangio Brothers reported the accident by telephone to Mr. Mathias, who on Monday wrote a letter to the Netherlands Insurance Company. This letter was received by the Netherlands on Tuesday, the 22nd, who immediately telephoned the office of complainant in San Francisco, which shortly thereafter served a notice of rescission of the policy on Strangio Brothers on the ground that its issuance had been obtained through concealment of facts.

Mr. Hayne then made an opening statement on behalf of intervenor Leslie. He stated the contention of the intervenor is that the Netherlands Insurance Company through a course of dealings with the complainant was not its broker but its agent, not alone by previous authorization but also by ratification through the act of issuance of the policy in question. He further stated that besides this the fact that the policy, although issued October 21st, by its terms took effect October 18th, the day before the accident, indicated that the risk was accepted by complainant as of that date and that no concealment was material. He also stated that immediately on the happening of the accident defendants notified Mr. Mathias, the only one they knew in the insurance transaction.

Mr. Atherton then made an opening statement on behalf of the defendants. He stated that he would prove that Mr. Mathias had been the regular agent for the Netherlands Insurance Company for several years and that for some months prior to the transaction in question said Company had an arrangement with complainant corporation by which public liability policy applications, received by the Netherlands Insurance Company, were farmed out with the Consolidated Indemnity and Insurance Company, complainant, and that the Netherlands was acting as agent for the Consolidated in all these matters. [62] He further stated that the defendants relied on the terms of the insurance policy which insured them from and after the 18th of October.

Samuel W. Beckett was then called as a witness for the complainant and testified that he was a deputy in the office of the insurance commissioner of the State of California. Solicitors for complainant then asked him whether or not, from the records of his office, E. L. Mathias of Stockton, California, was an authorized insurance agent on October 18th, 1930. Mr. Hayne, on behalf of his client, then made the objection that such testimony was incompetent, irrelevant and immaterial whether the agent was licensed, and this issue could not be raised between the insurance company and the insured in the absence of proof that the insured knew of this fact of want of license on the part of the agent. Mr. Glensor then stated as follows:

“Your Honor, I can see where this objection might be good, depending upon the purpose of the question. Now I want to say very frankly, from the statement that has been made here, that your Honor must see that the relationship of the parties is of some importance here, who was the agent, or who, or what? The purpose of this testimony is merely to show whether or not this man was a licensed agent, to show the fact whether he was a licensed agent, which might have some weight in determining whose agent he could be, and the weight that is to be given the testimony—in other words, we offer it for that limited purpose, and that limited purpose only.”

The Court announced that he would receive the evidence in view of this statement of its purpose. Mr. Beckett then testified that according to the records of the Insurance Commissioner, Mr. Mathias was not licensed as a broker during [63] 1930 and 1931 and was not licensed for the complainant corporation during 1930 and 1931.

PIERCE J. DEASY

was then called as a witness for the complainant, and after being duly sworn, testified as follows:

I am an insurance broker. I was manager for the Consolidated Indemnity and Insurance Company of New York at San Francisco on October 18th, 1930, some months prior to that date and some months afterwards. I had the appointment of local

(Testimony of Pierce J. Deasy.)

agents. Mr. Mathias of Stockton was not an agent for the Consolidated Indemnity and Insurance Company in October, 1930. I do not know him. I was underwriter and manager for the company at San Francisco. In the San Francisco office my business as manager embraced the acceptance of risks and the issuance of policies. The Netherlands Insurance Company had an office in San Francisco in October, 1930. Prior to October of 1930, I had some dealings with the Netherlands Insurance Company as represented by Mr. Gorham of that company. Mr. Gorham asked if my company would be interested in public liability and property damage automobile insurance for his office. He stated that the Netherlands Insurance Company did not write public liability insurance, although they did write property damage insurance. We talked about the matter—talked about it from the standpoint of underwriting and from the standpoint of remuneration—what it would pay the Netherlands Insurance Company as brokers on such business, and I indicated to Mr. Gorham that I was interested in such business but that it must be underwritten and entirely controlled by our own office and that we would have to have the full direction and control of our underwriters. Mr. Gorham said that that was acceptable to his company and that he was only interested in the service which my company could give his company. We then spoke of the brokerage remuneration to be paid them and when [64] that was agreed to the arrange-

(Testimony of Pierce J. Deasy.)

ment went into effect. In the course of this conversation I told Mr. Gorham that it was impossible to allow the Netherlands Insurance Company to issue cover notes in our behalf. After this conversation the arrangement went into effect. The Netherlands Insurance Company offered us insurance from time to time and we generally accepted it, though some was rejected after investigation. We paid the Netherlands the regular brokerage on business which we accepted. The remuneration paid the Netherlands was on the same brokerage basis as would be paid to any other licensed broker. I do not recall the issuance of the policy involved in this case.

The policy, numbered 6240, was then produced from the custody of defendants' counsel and handed to the witness. The witness then continued: I recall the issuance of this policy. It was issued October 21st, 1930. The application was received at our office on Monday the 20th of October and the policy was issued and delivered to the Netherlands Insurance Company on Tuesday the 21st. I first learned that there was an accident to a car covered by that policy on Wednesday, the 22nd. Mr. Gorham of the Netherlands Insurance Company gave me this information. As far as I know no premium was paid on this policy up to the time I have just referred to.

Mr. Bennett, on behalf of intervenor, Benschoter, then moved that the conversation between Mr.

(Testimony of Pierce J. Deasy.)

Gorham and the witness be stricken out as not binding on the intervenor, Benschoter. The Court denied the motion and Mr. Bennett, on behalf of his client, entered an exception to the ruling.

(Exception No. 1.)

Mr. Hayne then cross-examined the witness, who testified on

Cross-examination

as follows: The conversation I have just related between Mr. Gorham and myself took place three to [65] four months prior to October, 1930, to the best of my recollection. Our San Francisco office was not opened until March, 1930, but it did not take place in March but two or three months afterwards, possibly in May or June. In this conversation with Mr. Gorham of the Netherlands Insurance Company, it was agreed between us that the Netherlands Insurance Company would collect the premiums on each policy to be issued by the Consolidated Indemnity and Insurance Company on applications made through the Netherlands and that the Netherlands would then pay the premium to the Consolidated Indemnity and Insurance Company. We further agreed that the premium would not be collected later than the time provided by law, with the further understanding we could cancel the policy if the premiums were not paid as provided by law. The law I refer to is the Political Code providing for the payment of premiums not later than sixty days from the end of the month when

(Testimony of Pierce J. Deasy.)

the policy was issued. That conversation was to the effect that the premium should be paid at the end of sixty days from the end of the month in which the policy was issued and that is the usual insurance custom. I assumed in this deal that it was not necessary for the Netherlands Insurance Company to have a broker's license in order to transact business with our office. At the time of this conversation with Mr. Gorham I knew that the Netherlands Insurance Company had agents and that these agents were getting their own insurance and I also knew that they were likewise getting insurance that I expected to be placed with my company under this arrangement with the Netherlands Company that I have referred to. Automobile insurance isn't usually written over the counter. It is gotten by agents outside of the office. However, I was not interested in where the business came from as long as I got it and it was accepted. Applications from the Netherlands Insurance Company [66] for insurance came both over the telephone and by mail. We furnished the Netherlands Insurance Company with application blanks for this type of insurance and the Netherlands also used their own form.

The Court then interposed and asked the witness this question with reference to notices of loss received under policies issued by the complainant corporation on application through the Netherlands Insurance Company:

(Testimony of Pierce J. Deasy.)

“You did not recognize notice of loss as being in effect from the time it reached the Netherlands Insurance Company?”

The witness replied: “No, your Honor.”

Mr. Hayne then continued the cross-examination and the witness testified: I am not sure whether notices of loss coming under these policies came to us through the Netherlands Insurance Company or directly from the claimants. The general practice, however, was that these notices would come to us from both sources. Mr. Hayne then asked this question: “And from whatever source it came you recognized it as a notice of loss?”, to which the witness replied: “Yes, but bear in mind that in this case, in an insurance contract, if I may deviate, and it won’t be out of order, so I can perhaps better answer your question, you have fire, theft and collision insurance, and sometimes property damage insurance, upon which, as a general rule, the authority for the adjustment of such losses is generally delegated to the agents. So that notice of loss to an agent in those cases becomes, as a matter of fact, notice to the company because of the fact that generally speaking, the agents would have authority to negotiate settlements of such losses. However, under public liability, the exceptions are very, very few, and where there are exceptions they are generally arranged by written contract with the agent, for the adjustment of any public liability [67] claims so that in all cases herein, the Consolidated Indemnity & Insurance Company didn’t accept any

(Testimony of Pierce J. Deasy.)

notice of loss under public liability policies until that notice had actually reached its own claim department.

Mr. HAYNE.—I ask that the answer be stricken out, that part that the Consolidated Indemnity & Insurance Company didn't accept any notice of loss until the notice of loss had reached their own claim department, as a conclusion of the witness. Now necessarily, unless something was done by the company to indicate its acceptance or nonacceptance, it would be apparently a mental conclusion of the witness as to whether it was accepted or not."

"The COURT.—He must know what the rules are with regard to established acceptances. If he is not able to testify we will have to go over the whole list of files to see what the rules are. I think he can testify what the rules are. If you can show that a practice has grown in deviation of those rules, then you can show it, but I think he has a right to say what the practice is, and what is done in that regard. I will deny the motion to strike out. Who is better informed?"

The Court then denied the motion and Mr. Hayne, on behalf of his client, excepted to the ruling of the Court.

(Exception No. 2.)

The Court then asked the witness if that was the method of his office in handling claims, to which the witness replied, "Yes." The Court then asked whether there was any known deviations from this method, to which the witness replied, "No."

(Testimony of Pierce J. Deasy.)

“The COURT.—In other words, not only is that the method laid down in your office, but as far as you know, that is the method that was follows?
A. Yes.” [68]

Mr. Hayne resumed the cross-examination and the witness testified: I do not know whether a majority of notices of loss on public liability policies were received through the Netherlands or not. It did not make much difference to us, as the important thing was to have the claim received by our claim department. The Court then asked the witness, “In other words, the notice was not received by you until the claim department received them and it made no difference through what agency it came, or whether directly from the insured?” To this the witness answered affirmatively that in each case it was treated the same. The cross-examination then continued and the witness testified: We did not write any combined policy with the Netherlands Insurance Company. When I said that my company had no notice of the accident under the policy issued in this case until the 21st of October, I refer to my own knowledge and to our claims department as of that date. I do not refer to the knowledge of our representatives, if any.

Mr. Atherton, on behalf of the defendants, then cross-examined the witness, who testified as follows: When an agent of our company received a notice of loss and it was transmitted to our claims department, we proceeded to act upon it. With

(Testimony of Pierce J. Deasy.)

reference to the policy before the Court in this case, notice of claim came in from the Netherlands and was immediately given to our claims department. I did not follow the matter after it was referred to our claims department, since I had other business. Ultimately after investigation, the case was brought to me for review. This was after our claims department had made an investigation of the case.

Mr. Bennett, on behalf of intervenor Benschoter, then cross-examined the witness, who then testified as follows: It was not a general custom for our company to issue policies [69] effective as of the date of the application when several days intervened between the application and the date of the policy, but this was done in many cases and you might term it a custom of the company to do that, but not on a large scale, however. It was only done in our office where business came in from reputable, recognized brokers and where there was no thought of a claim arising between the date the policy was written and its effective date. That is the practice; was not general in pre-dating policies, but we did so pre-date other policies that came to us from the Netherlands Insurance Company and we did this also in the case of policies that came from our own agents in the field. These policies were effective as of the dates stated in the policy.

Mr. Hayne then asked leave to put a few more questions to the witness, who testified as follows:

(Testimony of Pierce J. Deasy.)

I said that we would pre-date the policy where the business came from reputable, recognized brokers and I considered the Netherlands Insurance Company in that class. I considered them both as reputable and recognized, and in case of a policy coming from the Netherlands it was my practice to date the policy as of the date of the application. I never told the Netherlands Insurance Company that I would not recognize notices of loss received from other agents or through other channels until they were received in our office.

I would like to give an explanation. When Mr. Gorham and I spoke with regard to our arrangements for writing business from his office we referred to claims and Mr. Gorham agreed that the Netherlands Insurance Company would co-operate in quickly forwarding to us any notice of claim that they might receive in their office. In public liability claims the manner of transmitting notice of loss does not mean anything; it does not make much difference. The Court then said: "No, [70] no, the question was whether the person who transmitted the claim was your agent; did you consider him your agent?" Answer, "No."

"The COURT.—When they received the claim or anything else, you viewed it as the act of their agent of the man who made the claim?"

A. Yes.

Q. You didn't recognize him as your agent?

A. Not until we received the claim.

(Testimony of Pierce J. Deasy.)

The COURT.—I did not want to get anything in the record that would indicate that you deviate on that.”

Mr. Glensor then commenced his

Redirect Examination

and the witness testified: In San Francisco insurance is generally written through brokers, but in country territory it is generally written through agents. We send our bill for premiums to the Netherlands and generally they are sent to brokers. The Court then asked: “What did you do in the case of Netherlands—view it as a broker?” Answer, “As a broker we billed the Netherlands.” The general custom in San Francisco was that when the policy came through a broker the bill was sent to the broker and we received the premium from the broker, and if we didn't receive it from the broker we generally send a notice of cancellation of the policy. Under our arrangements with the Netherlands Insurance Company, the policies were delivered to that company. Under this arrangement, if the premium was paid, we paid the commissions to the Netherlands Insurance Company.

Under the general custom in San Francisco notices of loss are delivered by policy holders to the broker who wrote their policy. This service the brokers perform for the benefit of the assured, but no other general service.

My company had a claim department to investigate public liability and damage claims. Claims

(Testimony of Pierce J. Deasy.)

are handled just [71] the same, no matter how the notice of loss comes to the company.

I have been an insurance broker in California for fourteen years. Mr. Glensor then asked the witness this question:

“Q. I will ask you another question: Is there any difference between the manner in which your company dealt with the Netherlands Insurance Company under this arrangement that you have testified to here and that in which it dealt with any other broker?”

Mr. HAYNE.—To which I object upon the ground that it calls for the conclusion of the witness, a conclusion of law that has to be passed upon by the court, and furthermore it is incompetent, irrelevant and immaterial.

Mr. ATHERTON.—I join in the objection.

Mr. BENNETT.—I join in the objection.

The COURT.—As manager of the company he can testify to it if he has any knowledge, I think he can testify. I will allow it.

Mr. HAYNE.—We enter an exception.”

(Appellants' Exception No. 3.)

The witness answered “No” to the question.

Mr. Bennett then commenced

Recross Examination

and the witness testified: The reason for dating back insurance policies as of the date of application are many. I will have to speak in generalities before I can really correctly answer you. I, yes-

(Testimony of Pierce J. Deasy.)

terday, had a similar experience. I was out of town, and upon my return I noticed that my automobile insurance had expired four days before. I called the company and asked them to place a renewal, and they said "As of what date?" I said "As of the expiration date." They dated it back four days for me. They did it for me because they appreciated that I wouldn't in the meanwhile have had a claim and have kept it from them. Now *e* have that condition with respect to automobile insurance policies that are handled by finance companies and wherein the finance companies don't want to finance them where there is no insurance. We have a case [72] wherein the company will cancel the policy. The broker will not know the definite date of cancellation, he won't know it definitely. * * * He will want to date it back to show that his assured is properly covered, and he does not want to have a hiatus period come in whereby he might have had a claim and not be covered. Those things are generally looked into.

FRED J. GORHAM

was then called as a witness for the plaintiff and after being duly sworn, testified as follows:

I am superintendent of the automobile insurance department of the Netherlands Insurance Company. I was working in that capacity in the month of October, 1930. In the early part of 1930

(Testimony of Fred J. Gorham.)

I had a conversation with Mr. Deasy, who represented the Consolidated Indemnity and Insurance Company. It took place in the first of May or the latter part of April, or in that neighborhood. No one else was present. He was then asked the substance of this conversation, to which Mr. Bennett, on behalf of his client, objected on the same ground that he objected to the same conversation as testified to by Mr. Deasy. The Court overruled the objection and Mr. Bennett entered an exception.

(Appellants' Exception No. 4.)

The purpose of the conversation was to place the public liability insurance which my company cannot write, and which was given to us by our agents or brokers. I asked Mr. Deasy if the Consolidated Indemnity and Insurance Company would be open for such business as we might offer them. I told him that the business was public liability insurance where the assured would want public liability, property damage, fire, theft and collision insurance on automobiles. I said we would write the fire, theft and collision and that the property damage and liability would be placed with them, if acceptable, and that we would phone them as it [73] came to our office. He agreed to the proposition. I did not ask him to act as broker for his company or agent for the company. I just asked him if he would take the business we offered. We agreed my company would get the regular broker's commission. Afterwards the manager of my company approved of the arrangement and policies were

(Testimony of Fred J. Gorham.)

placed with the Netherlands Insurance Company under this arrangement, they paying us a commission on the premium. We always phoned this business to the Consolidated and Indemnity Insurance Company and they would send us the policy if acceptable to them, after which we would mail it to our broker or agent. My company received the application sent in by Mr. Mathias for a policy on the Strangio Brothers car.

The witness then identified complainant's Exhibits A and B for identification as follows: Complainant's Exhibit A for identification is the policy I referred to. Complainant's Exhibit B for identification is the application for this policy received by us from E. L. Mathias. The witness then continued: We received this application Exhibit B for identification on October 20th, 1930, and on the same day telephoned the Consolidated Indemnity and Insurance Company. Exhibit B for identification consists of three sheets, a yellow sheet, a blue sheet and white sheet. The blue sheet is the application I have just referred to. The white sheet is a daily report being a copy of the policy. We attached this to the application when the policy was written. I think we received the policy either on October 21st, or October 20th, and we immediately mailed it to Mr. Mathias. On October 22nd, we received a letter from Mr. Mathias dated October 20th.

This letter was marked Complainant's Exhibit 1 and offered and received in evidence, and read as follows: [74]

“Stockton, California. October 20th, 1930.

The Netherlands Insurance Company, San Francisco, California.

Gentlemen:

Strangio Brothers, Studebaker Big 6 Phaeton involved in accident Sunday the 19th about 2:30 P. M. at intersection of Sonoma Avenue and N. Sutter Street, this city, facts as follows: John Strangio, not a member of Strangio Brothers firm had just left his *resident* about two and a half blocks from point of collision, and was proceeding east on Sonoma Avenue, at about 15 miles per hour on right hand side of street. Upon reaching intersection of Sonoma Avenue and N. Sutter Street, he noticed Willys Knight closed car coming south on No. Sutter Street, to his left at a rapid rate of speed, about 40-45 miles per hour. Strangio applied his brakes and was approximately at a stop when left front portion of Studebaker was struck by the W. K. and both cars were thrown in different directions as noted on sketch attached. It is thought that the party injured jumped from the W. K. receiving injuries necessitating the amputation of his arm. Am attaching newspaper account of accident herewith. No statements were made to Strangio by the driver of the W. K. as to his version of the accident, due no doubt

by the excitement caused by the serious injury of the man riding with him. Neither car overturned, and neither Strangio nor the driver of the W. K. was hurt. Both cars suffered considerable damage. Strangio Brothers have interviewed Attorney Warren Atherton of this city, who advised them that from the facts presented that the driver of the W. K. was guilty of all the negligence, no negligence having been contributed by Strangio. In this connection, wish to mention that John Strangio was driving the Studebaker at the time of the accident for his own private affairs, and was not going about the business of Strangio Brothers or acting as their agent. The coverage on all of Strangio Brothers' cars was accepted by me Saturday just the day before the above described accident. Any further advice or information concerning this accident which you may need will be furnished if you will let me know your wishes.

Sincerely,

E. C. Matthies,

Emil L. Matthies,

719 S. Regent Street."

(Testimony of Fred J. Gorham.)

The witness then continued: Upon receipt of this letter I immediately took it over to the Consolidated Indemnity and Insurance Company. At that time, namely, on October 22nd, the insurance policy was not in our office but had been sent to Stockton, which was the regular course of business.

(Testimony of Fred J. Gorham.)

Complainant's Exhibit B for identification was then offered and received in evidence as complainant's Exhibit No. 2. [75] Mr. Gorham continued: The yellow sheet pasted on the face of the blue sheet as part of Plaintiff's Exhibit 2 obscures the word "Netherlands Insurance Company," which is found printed on the face of the blue sheet.

The complainant then offered in evidence Plaintiff's Exhibit A for identification, which was admitted in evidence and marked Complainant's Exhibit 3.

Mr. Atherton then

Cross-examined

the witness, who testified as follows: Under these policies issued by our company on application forwarded through the Netherlands Insurance Company, we charged the premiums to the latter company. I am not sure what would have happened had neither the policy holder nor the Netherlands Insurance Company paid the premium. I am not sure whether we would have collected from the Netherlands. The application from Strangio Brothers on the 18th covered three cars; the car involved in the accident and two other cars. I was in the employ of the Netherlands Insurance Company since January, 1930.

Mr. Hayne then cross-examined the witness, who testified as follows: When I testified that a broker's commission was agreed to be paid the Netherlands in the conversation between myself

(Testimony of Fred J. Gorham.)

and Mr. Deasy I do not mean that that language was used in the conversation. The word "brokerage" was not used in that conversation. It was just the commission being paid. The amount of the commission would be the same whether it was an agent's commission or a brokerage commission in the case of public liability insurance. In telephoning insurance applications to the Consolidated, the data we would give the Consolidated over the telephone was the name, occupation and address, the coverage on the car and the motor number of the car; that was all. I do not recall that the Consolidated ever rejected any such insurance that we applied to them for [76] over the telephone but they did reject them later. Plaintiff's Exhibit 2 was prepared in the office of the Consolidated Indemnity Company except the notice of cancellation which was prepared in our office. In my conversation with Mr. Deasy, nothing was said as to the amount of public liability insurance that we would turn over to him under the arrangement; they were to take the business that we offered them. As a matter of practice I think all of such insurance was turned over to the complainant. We did not have any such arrangement with any other company than the Consolidated Indemnity and Insurance Company with respect to public liability insurance during the time this arrangement was in effect with that company. Prior to that time we had a similar arrangement with another public liability insurance company. In such arrangement it was

(Testimony of Fred J. Gorham.)

contemplated that the biggest part of such business would be turned over to the company with whom the arrangement was made, but there was no agreement as to how much would be given them, nothing was said as to what would be given them, or that all the business would be given them. The volume wasn't guaranteed, but the fact was that the major portion was to be given them. That was understood. I understood that the major portion of the business was going to the company with whom the arrangement was made. Notices of loss when received through our company were transmitted to the Consolidated Indemnity and Insurance Company immediately. This was the practice. It wasn't an unusual practice. No one on behalf of that company ever disapproved or forbid this practice and nothing was said to me about not recognizing such notices until they were received in the office of the Consolidated. I never told any of our agents to send notices of loss directly to the Consolidated. In my conversation with Mr. Deasy that I have been referring to, all I said about notices of loss was that as soon as I receive them, they would be immed- [77] iately delivered to the Consolidated Indemnity Company. I do not recall that Mr. Deasy made any reply to this statement. I do not know when Mathias became an agent of our company and I am not sure that he was an agent of our company at the time of this transaction.

(Testimony of Fred J. Gorham.)

The COURT.—Q. Do you know whether he was an agent or not at the time this transaction occurred?

A. I don't know.

Q. Do you know whether he sent in any applications to your company?

A. I don't know that either. After this arrangement was made between the Netherlands Insurance Company and the Consolidated Indemnity and Insurance Company, nothing was done to notify Mr. Mathias that thereafter public liability insurance would be carried in the Consolidated. I have been in the insurance business in San Francisco and Los Angeles, as a broker, for eight years and am familiar with the customs pertaining to agents and brokers. The Netherlands was acting as a broker for the Consolidated in my opinion. According to my understanding of the law an insurance company cannot be an agent. Except for this rule of law the conduct of business between the Netherlands and the Consolidated would be just the same if the Netherlands were an agent of the Consolidated as it would be if the Netherlands were a broker. I wish to add that an agent has certain powers that a broker has not. That is to say, an agent may bind the company where a broker cannot. I am referring to the writing of binding slips which bind the company to the policy holder. This difference in legal liability is the difference between an agent and broker. A broker represents both the policy

(Testimony of Fred J. Gorham.)

holder and the company. An agent and broker are similar with the exception that the agent has binding power and the broker has not. With respect to the physical way of carrying on business an agent and broker carry on in the same way. In the case of the relationship of the Netherlands Insurance Company to the Consolidated [78] Indemnity and Insurance Company, as far as the physical acts were concerned between the two same would be equally susceptible to either interpretation because the business is the same, the only difference is in legal theory. The statement on the application Complainant's Exhibit 2, "this car insured before (last year) you have above information," is true. We had the insurance on Strangio Bros. previous to the issuance of this new policy, although the public liability was not written with the Consolidated. With regard to public liability insurance coming through the Netherlands to the Consolidated Indemnity and Insurance Company, if the policies were phoned to us by an agent or broker, we asked them in all cases for the effective date and if they said two or three days previous we wanted to know the reason.

Q. In the case of a policy where you received a written application for public liability insurance and in the application it was stated the date of the policy, requesting that it be the same as the application, it was your custom, was it not, to honor such request?

(Testimony of Fred J. Gorham.)

A. We phoned them to the Consolidated Indemnity and Insurance Company or whatever company would write the policy and if they wanted to accept it that way it was up to them.

Q. Did they accept it that way in this agreement?

A. On this particularly instance they did—yes. It was the rule so far as dating back of policies is concerned to date them as of the date of the application; I am referring to public liability policies written by the Consolidated through the Netherlands under the arrangement referred to. The premium was calculated as of the effective date of the policy so if the policy was dated back, then that was the date of calculating the premium. This was the rule.

On

Redirect Examination

by Mr. Glensor, the witness stated: The words, "cancelled flat" in red ink on Exhibit 2 [79] means that the policy was cancelled without any charge of premium at all. A broker usually functions in this way: first the broker will obtain from his client a line of insurance and submits it to whatever company he wishes to do business with or whatever company he is in the practice of doing business with. If the line is acceptable to the company it will write and deliver the policy to the broker who will deliver it to his client. An agent obtains business from his client in the same way and places it in the company which he is agent for. Agents some-

(Testimony of Fred J. Gorham.)

times issue binding slips. A broker has to submit insurance to the company for final action.

On

Recross Examination,

Mr. Hayne asked this question of the witness:

“Mr. HAYNE.—Q. Then the only two reasons why you say the Netherlands Insurance Company was a broker instead of an agent of the Consolidated Indemnity & Insurance Company was, first, because it had no agent’s license, and secondly because they weren’t authorized to issue policies themselves, that is, the Netherlands, not authorized to issue policies of the Consolidated Indemnity & Insurance Company.”

The COURT.—This is just argument. He has said positively that they didn’t enter into an agreement of that kind, so I don’t see any reason for the question. We are just arguing the case. He has stated positively they were not agents, and he is the one who made the negotiations. He is either telling the truth or he is lying.

Mr. HAYNE.—I am just testing the force of his conclusion that they were not agents.

The COURT.—In other words, you are arguing. I will sustain the objection.

Mr. HAYNE.—I note an exception.

(Appellants’ Exception No. 5.)

The previous Strangio insurance on these cars that I have referred to expired in July, 1930.

(Testimony of Fred J. Gorham.)

The complainant then offered in evidence the notice of rescission and same was received and marked Complainant's [80] Exhibit 4. It was thereupon stipulated between respective counsel that if the individual who acted on behalf of the Consolidated Indemnity and Insurance Company in issuing the policy, Complainant's Exhibit 3, had possessed at the time of such issuance actual, as distinguished from constructive, knowledge of the happening of the automobile accident on October 21st, he would not have issued such policy. Mr. Glensor then offered in evidence the interrogatories propounded in the complaint and the answers of Strangio Brothers thereto. Said documents were received in evidence as Complainant's Exhibit No. 5, and are attached to the complaint of complainant and the answer thereto as filed by defendants Strangio Brothers. With this stipulation the complainant rested.

It was then stipulated by the complainant that the Consolidated Indemnity Company had timely notice of the happening of the automobile accident on October 21st, but rejected the claims and refused to defend both actions that were instituted as a result of the accident, namely: the action of Benschoter against Strangio Brothers and the action of Leslie against Strangio Brothers upon the ground of no liability. The intervenor, Leslie, through his counsel Mr. Hayne then offered in evidence the judgment roll in the case of Leslie v.

(Testimony of Fred J. Gorham.)

Strangio Brothers. It was received in evidence and marked Intervenor Leslie's Exhibit No. 1. The intervenor Benschoter, represented by Mr. Bennett, then offered in evidence the judgment roll in the case of Benschoter v. Strangio and others. It was received in evidence and marked Intervenor Benschoter's Exhibit No. 1.

Mr. Bennett and Mr. Hayne, on behalf of their respective clients, then moved that all evidence concerning the arrangement between the Netherlands and the Consolidated [81] Indemnity and Insurance Company be stricken from the record on the ground that no fraud was shown and same constitutes an attempt to vary by parol the terms of a written instrument, to-wit: the policy. The Court denied the motion and both counsel duly excepted.

(Appellants' Exception No. 6.)

It was then stipulated that writs of execution were issued in both actions, namely: Leslie v. Strangio Brothers and Benschoter v. John Strangio, et al., and that said writs were returned wholly unsatisfied prior to the filing of the complaint in intervention. It was further stipulated that said judgments became final more than thirty days before the filing of the respective petitions in intervention. It was further stipulated that reference to the arrangement between the Netherlands Insurance Company and the Consolidated Indemnity Insurance Company that in the event the policy holder failed to pay a premium the Consolidated

(Testimony of Fred J. Gorham.)

and Indemnity Company never attempted to collect such premium from the Netherlands Insurance Company, not only in this case but generally of brokers.

TOM STRANGIO.

Tom Strangio was then called as a witness for the defendants and intervenors and after being sworn, testified as follows: My name is Tom Strangio and Fred Strangio is my brother. My brother, Fred and myself, compose a partnership known as Strangio Brothers. This was true in 1930 and ever since has been true. John Strangio is another brother who was never a member of the partnership. On October 19th, 1930, he was twenty-four years of age and had an operator's license issued by the Department of Motor Vehicles. The Court then interrupted and asked whether or not the only issue was not whether the company was legally chargeable with the issuance of the insurance policy and if the insurance policy was in [82] effect. It was stipulated by counsel for complainant that this was correct. The witness Tom Strangio then continued to testify as follows: At the time of the accident the car was being driven by John Strangio with the consent of Strangio Brothers. Neither of the judgments in favor of Leslie or in favor of Benschoter have been paid in whole or in *paid*. I applied to Mr. Matthias for insurance on October 18th, 1930, at about noontime.

(Testimony of Tom Strangio.)

This application covered the car that was involved in the accident and two other cars. At that time I did not know Mr. Mathias had no salesman's license. I just went to him and asked him for public liability coverage on the three cars. I did not specify the company I wanted these policies written in. I gave him the car numbers and the amount of insurance. I didn't know that he represented the Netherlands Insurance Company. Mr. Matthias has written insurance for me for about five years before this. I notified Mr. Matthias of the accident about one-half hour or an hour after it happened. I paid Mr. Matthias in full for the policy on these three cars. This was about two weeks after the policies were issued. I never received the money back. I always paid Mr. Matthias for insurance any time from a week to sixty days after the date the policy was delivered. That was the understanding between us. On October 18th, the three cars were not covered by insurance. The insurance had expired on them several months before October 18th, 1930.

EMILE L. MATTHIAS.

Mr. Matthias was then called by the defendants and intervenors as a witness and testified as follows: My name is Emile L. Matthias. In the year 1930 I was a Southern Pacific clerk and wrote insurance part time for the Netherlands. I had authority from them. This authority was in the form

(Testimony of Emile L. Matthias.)

of a license and also correspondence at the inception of the agency. I had been sending applications to the Netherlands [83] for insurance since 1925 or 1926, four or five years. This included all types of automobile insurance. As a result of these applications I received commissions from the Netherlands Insurance Company. I got twenty-five per cent of the premium. I do not know what their arrangement was. I know I got twenty-five per cent commission. In the case of public liability insurance the policy that came back would never be a Netherlands Insurance policy since they did not write that kind of insurance. Before the receipt of the policy on the Strangio cars involved in this case I had never received from the Netherlands a public liability policy of the Consolidated Indemnity and Insurance Company. I believe that was a new company that the Netherlands had made connection with. I did not know the name of this new company prior to actually receiving this policy. On Saturday the 18th of October, Mr. Strangio told me to go ahead and get the insurance. I had been trying to get insurance for about two weeks and I called them up about their insurance on Saturday prior to the accident, and he told me to go ahead and secure it. I acted upon a telephone conversation. I then made out the daily report. It was not the practice of the Netherlands Insurance Company to receive signed applications for insurance policies. There was none in this case; they had

(Testimony of Emile L. Matthias.)

never instructed me to get signed applications. They had never protested on account of my not securing signed applications for insurance policies. I mailed the daily report, that is the blue sheet in Plaintiff's Exhibit 2 to the Netherlands Insurance Company at San Francisco. Mail was the method of communication I used during the entire period I worked with them. They never protested about this method of communication. I mailed it the following morning after receiving the application, that is to say, on the 19th; sometime before noon. I received a notice of the [84] accident sometime in the afternoon of Sunday, October 19th, possibly 3:30 or 4 o'clock at my home. They told me that the accident had happened at 2:30 that afternoon. I received the money for the premium from Mr. Strangio and sent it to the Netherlands Insurance Company. Some time later they returned the money order to me. I had no definite arrangements with Mr. Strangio as to the time of payment of premiums on his insurance, but if he let it run for a month I would go around and remind him about it. I never asked for payment in advance.

Mr. Glensor then cross-examined the witness who testified as follows: I don't believe I had a license in October, 1930. For some time prior to that time I did have a license; the last one expired on June 30th, 1930. I had had insurance on the car involved in the accident prior to this time and to the best of my recollection it expired in the spring or

(Testimony of Emile L. Matthias.)

early summer of 1930. Mr. Strangio applied for the insurance about noon of October 18th, 1930. I signed the application, the blue sheet in Plaintiff's Exhibit 2, on Saturday night and mailed it on my way to church on Sunday morning. I don't remember when I received the policy but possibly Wednesday or Thursday. I wrote the letter, Plaintiff's Exhibit 1, on Monday night, October 20th. I don't remember whether I mailed it that night or next morning on my way to work. I think it is more likely that I mailed it Tuesday morning than Monday night. Probably about 8 o'clock Tuesday morning. I had not received the policy when I wrote this letter. As soon as I got the three policies I delivered them to Strangio Brothers. At this time I didn't know that the company had cancelled the policy; the premium was returned to me by the company.

The COURT.—Q. This Complainant's Exhibit No. 1 in evidence, dated October 21st, 1930, was the only communication [85] either oral or written that you made at that time, on or about that time, to either the Netherlands Insurance Company or to the Consolidated Indemnity and Insurance Company. Is that correct?

A. Yes, sir.

Q. In other words, you didn't phone them that afternoon?

A. No.

Q. Although you had mailed only an hour or so before an application for a policy to be issued?

(Testimony of Emile L. Matthias.)

A. Yes.

I had written other applications for insurance in the Netherlands Insurance Company prior to October, 1930, probably six to eight; both automobile and fire insurance. I received policies back in each case. I sent premiums for these policies to the Netherlands Insurance Company, retaining a portion for myself as well as a commission. I did not telephone this application for insurance to the Netherlands Insurance Company, although I knew when I received word that the accident had occurred that the Netherlands Insurance Company had not received my request for issuance of a policy and I also knew that there had been an accident on the very machine involved.

On

Redirect Examination

by Mr. Atherton, the witness continued:

Mr. ATHERTON.—Q. Had you had occasion to ask for pre-dated policies on other occasions prior to this?

A. No, I always dated them on the date that they were received.

Q. The date of the application was the date you received the order?

A. Yes, sir.

Q. Now when the policies came, the policies that were received from the Netherlands Insurance Company, dated October, 1930, they were dated,

(Testimony of Emile L. Matthias.)

were they, and issued in San Francisco on the date that you put on the application?

A. The date on the daily report, the application, as you call it.

Q. The date of your daily report?

A. That is right.

Q. What impression did you have on Sunday, the 19th of October, as to what date the application filed by Strangio Brothers applying for insurance was effective from? [86]

Mr. GLENSOR.—That is incompetent, irrelevant and immaterial, and calls for the conclusion of the witness.

The COURT.—It is to be received only for the possible reason that it might have been information of which he should have notified them, but not affecting any legal right in any sense.

Mr. ATHERTON.—My question was only prompted by one that you asked that gave me an impression that you might probably say that there was an ulterior motive in failing to send a telephone message.

The COURT.—Well, ask him what his state of mind was. What was the reason you didn't notify them?

A. I had never notified the Netherlands Insurance Company by telephone.

Q. You could have notified the Netherlands Insurance Company by telephone, could you not, before your letter arrived? It couldn't have arrived until the next day, that was Sunday?

(Testimony of Emile L. Matthias.)

A. I had never in the years I had done business with the company ever notified them by telephone or telegraph.

Q. Didn't you consider that there might be reason to do so in this case? You recognize yourself as an agent of the Netherlands Insurance Company?

A. Yes, sir.

Q. Didn't you think you might be protecting their interests to see that there would be no insurance of a policy in a case of this kind?

A. The only thing that occurred to me was that I had accepted his insurance.

Q. In other words, you felt that having accepted the insurance on the 18th; that is, having accepted his insurance for the purpose of issuing a policy, that you had been able to bind whoever was going to issue the policy.

A. I thought he had his insurance.

Q. You just assumed that?

A. I assumed it.

Mr. BENNETT.—Q. On what did you base your assumption that the man was covered as of the date of the acceptance, and as of that date?

Mr. GLENSOR.—That is objected to on the same grounds.

The COURT.—The objection is overruled.

Mr. [87] GLENSOR.—Exception.

A. Because over a period of years that I have acted as agent, the date of my acceptance of the

(Testimony of Emile L. Matthias.)

insurance was considered as the date of the application and the daily report, although, sometimes written a day after I accepted the insurance, but the policies always came to me as of the date of the daily report and the premium was dated from that time.

The COURT.—Q. You found the policy was dated as of the same date of the acceptance?

A. And the man paid his money from that date.

Q. You had no connections with the Consolidated Indemnity & Insurance Company other than whatever connections the Netherlands Insurance Company had?

A. That is all.

On

Recross Examination

the witness testified:

Q. In reaching these conclusions you have just testified to, you were acting under the assumption that you were an agent for the Netherlands Insurance Company, weren't you?

A. Yes, sir.

Q. And that when you accepted Mr. Strangio's order or had that conversation with him over the telephone, that from that time on the Netherlands Insurance Company was bound to give him insurance?

A. That was my assumption.

The COURT.—Q. As of the date of the application?

(Testimony of Emile L. Matthias.)

A. As of the date of the application.

Q. And you didn't know anything about the Consolidated Indemnity & Insurance Company, did you?

A. I did not. Then, I had never heard of it.

Q. You had never heard of it. Now, when you received this notice of the accident, about 3:30 or 4 P. M. on Sunday, was there any reason that you care to give, why you didn't write the Netherlands Insurance Company that night, even if you didn't care to telephone or telegraph giving them the information which you had just received?

A. I got a very brief description of the accident at the time. I don't believe that Mr. Strangio, who phoned me, really knew all the details himself. He told [88] me that there had been an accident and that the brother Johnny had been involved in it.

The COURT.—Q. Did you know the facts set forth in this letter?

A. Not at that time. That developed the following day.

Q. When was it obtained?

A. The evening after the accident, and from the newspaper clipping which was attached.

Mr. GLENSOR.—Q. But you didn't go to the scene of the accident that night?

A. No.

Q. Or make further inquiries in order to turn in a report?

A. No, sir.

(Testimony of Emile L. Matthias.)

Q. You waited until you got further details before notifying the company, which you assumed was your principal and of which you were the agent?

A. Yes, sir.

Mr. GLENSOR.—That is all.

Mr. Atherton then, with the consent of Mr. Glensor, made a statement for the record to the effect that, at the request of Strangio Brothers, he appeared in the Superior Court in defense of each of the actions, the judgment rolls of which were introduced in evidence as the intervenors' respective exhibits. That he defended these cases in that Court. That his services were at least worth \$83.00.

Whereupon both parties submitted the case to the Court.

The following is a synopsis of the contents of the exhibits introduced in this case:

Complainant's Exhibit No. 1 is the letter dated October 20th, 1930, signed by E. C. Mathias and Emile L. Mathias and set forth in full in the foregoing narrative of evidence.

Complainant's Exhibit No. 2 consists of three documents. The first is entitled, "Automobile Daily Report." It is on a form of the Netherlands Casualty Company and is an application for public liability and property damage insurance on the Studebaker Phaeton automobile of Fred Strangio [89] and Tom Strangio, doing business as Strangio Brothers. It is signed by E. L. Matthias, 619

South Regent Street, Stockton, California, and has the notation, "Daily report mailed this 18th of October, 1930." The second sheet is an application made out on the form of the Consolidated Indemnity and Insurance Company. It is an application for Policy AL6240, and contains the facts with regard to such policy which are hereinafter stated when the policy is described. It contains the clause, "the policy period shall be twelve calendar months beginning on the 18th day of October, 1930, at 12:01 A. M. and ending on the 18th day of October, 1931, at 12:01 A. M.; as to both dates standard time as of the place where this policy has been countersigned." In pencil at the top of this sheet is the name, "E. L. Matthias." This sheet bears no signature and has no space for a signature.

Complainant's Exhibit No. 3 is a policy of insurance of the Consolidated Indemnity and Insurance Company issued to Fred Strangio and Tom Strangio doing business as Strangio Brothers. The number of the policy is AL 6240. The policy contains the following provision: "The policy period shall be twelve calendar months beginning on the 18th day of October, 1930, at 12:01 A. M. and ending on the 18th day of October, 1931, at 12:01 A. M., as to both dates standard time at the place where this policy has been countersigned." The policy was countersigned at San Francisco, California, on the 21st of October, 1930. It insures the assured against loss from the liability imposed by

law upon the assured on account of bodily injuries, whether resulting fatally or not, suffered, or alleged to have been suffered, within the policy period by any person, or persons, by reason of the ownership, maintenance or use of any automobile described in Declaration 8. Declaration 8 describes a Studebaker Phaeton Big-6 Model, [90] 1926, being the same automobile which, while driven by John Strangio, was involved in the accident referred to in the pleadings and in this record. The policy contains the following limitations: legal liability for bodily injury or death, one person, limits \$10,000.00; one accident limits \$20,000.00. Legal liability for damage to property of others in one accident, \$5,000.00. The premium charged named in the policy is \$41.40 for a year. The policy contains an agreement of the company to defend in the name and on behalf of the assured suits for damages brought on account of injuries insured against and the further agreement that the company will pay all costs taxed against the assured in any legal proceeding defended by the company, all accruing interest on judgments entered as a result thereof. The policy also provides that the insurance extended so as to be available in the same manner as to the named assured and under the same conditions to the additional assured, which is defined to mean any person while riding in or legally operating an automobile insured by the policy.

Intervenor Leslie's Exhibit No. 1 is the judgment roll of the action in the Superior Court of the

State of California, in the County of San Joaquin, the judgment being in favor of Harold Leslie, the plaintiff, and against John A. Strangio, Fred Strangio and Tom Strangio. This judgment is set forth in Paragraph II of the complaint in intervention of Harold Leslie and for this reason is not here repeated. The contents of the judgment roll consists of a complaint, answer, findings of fact and conclusions of law and judgment. The complaint set forth a cause of action for personal injuries suffered by Harold Leslie on the 20th of October, 1930, and further facts with reference to said accident which have been stated in this record and which support the judgment.

Intervenor Benschoter's Exhibit No. 1 is the judgment [91] roll of the action in the Superior Court of the State of California, in the County of San Joaquin, the judgment being in favor of James C. Benschoter, the plaintiff, and against John A. Strangio, Fred Strangio and Tom Strangio. This judgment is set forth in Paragraph II of the complaint in intervention of James C. Benschoter on the 20th of October, 1930, and further facts with reference to said accident which have been stated in this record and which support the judgment.

CERTIFICATE.

The undersigned, Harold Louderback, being the Judge before whom the above entitled action was

tried, hereby certifies that the foregoing narrative of evidence and synopsis of exhibits is true and correct and same is hereby settled, allowed and approved as a true and correct narrative of evidence and synopsis of exhibits in the above entitled action.

Dated this 18th day of November, 1932.

HAROLD LOUDERBACK,
Judge of the United States District Court, for the
Northern District of California. [92]

[Title of Court and Cause.]

STIPULATION.

It is stipulated by and between the parties hereto that the annexed narrative of evidence is true and correct and same may forthwith be settled, allowed and approved as such by the Judge who tried the case.

GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainant.

WARREN ATHERTON,
Solicitor for Defendants.

NUTTER & RUTHERFORD,
A. P. HAYNE,

Solicitors for Intervenor, Harold Leslie.

SIDNEY BENNETT,

Solicitor for Intervenor, James C. Benschoter.

[Endorsed]: Filed Nov. 19, 1932. [93]

[Title of Court and Cause.]

PETITION FOR INTERVENORS AND DEFENDANTS FOR APPEAL FROM JUDGMENT MADE AND ENTERED AUGUST 25th, 1932, GIVING JUDGMENT FOR CANCELLATION OF POLICY AND DENYING RECOVERY TO SAID INTERVENORS.

To the Honorable, Harold Louderback, Judge of the above entitled Court:

Now come intervenor Harold Leslie, by his solicitors Nutter & Rutherford and A. P. Hayne, intervenor James C. Benschoter, by his solicitor Sydney C. Bennett, and defendants Fred Strangio and Tom Strangio, doing business as Strangio Bros., by their solicitor Warren H. Atherton, and believing themselves to be agreed by the judgment of this Court made and entered in this cause on the 25th day of August, 1932, granting the prayer of complainant's complaint and denying the prayer of said respective intervenor's complaints in intervention and of said defendants' answer, do hereby appeal from said judgment and decree to the United States Circuit Court of Appeals, for the Ninth Circuit, and for reasons specified in the assignment of errors which is filed herewith, they pray that this appeal be allowed and that a transcript of the record, proceedings and papers upon which said [94] judgment and decree was made, duly authenticated,

may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 5th day of October, 1932.

WARREN H. ATHERTON,
Attorney for Defendants.

NUTTER & RUTHERFORD,
A. P. HAYNE,

Attorneys for Intervenor, Harold Leslie.

SYDNEY C. BENNETT,
Attorney for Intervenor, James C. Benschoter.

Received a copy of the within petition of defendants and intervenors for appeal from judgment made and entered August 25th, 1932, etc., this 5th day of October, 1932.

GLENSOR, CLEWE, SCHOFIELD
& VAN DINE,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 5, 1932. [95]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS BY INTERVENORS, HAROLD LESLIE AND JAMES C. BENSCHOTER, AND BY DEFENDANTS FRED STRANGIO AND TOM STRANGIO, DOING BUSINESS AS STRANGIO BROTHERS, ALL BEING APPELLANTS.

Now come intervenor, Harold Leslie, by his solicitors Nutter & Rutherford and A. P. Hayne,

intervenor James C. Benschoter, by his solicitor Sydney C. Bennett, and defendants Fred Strangio and Tom Strangio, doing business as Strangio Brothers, by their solicitor Warren H. Atherton, and in connection with their petition for appeal from the judgment and decree of said Court, made and entered in said cause on the 25th day of August, 1932, assign for errors in said judgment and decree and the proceedings of the Court therein and in the trial preceding same, the following:

1. The Court erred in finding that the defendants applied to complainant, Consolidated Indemnity Company, on the 21st of October, 1930, for issuance of the policy and in failing to find that such application was made on the 18th of October, 1930. [96]

2. That the Court erred in failing to find that the policy issued October 21st, 1930, was dated and by its terms effective as of October 18th, 1930.

3. That the Court erred in finding as in paragraph IV that complainant was induced to issue said policy by the fraud or deceit or concealment of defendants with respect to a collision between the insured automobile and another automobile operated by one Benschoter which took place on October 19th, 1930.

4. That the Court erred in finding that the complainant corporation first learned of said accident on the 25th of October, 1930, and in failing to find that it had said knowledge prior to the time it is-

sued said policy, to-wit: on or about October 19th, 1930.

5. That the Court erred in failing to find that on the 21st day of October, 1930, the complainant corporation, pursuant to agreement made with it by the defendants on October 18th, 1930, executed and delivered its certain policy of insurance dated October 18th, 1930, and effective from and after said last named date.

6. That the Court erred in finding that it is not true that Fred and Tom Strangio performed each and every, all and singular, the covenants and conditions in said policy of insurance on their part to be performed and in failing to find that said defendants had in fact performed all the covenants and agreements in said policy.

7. That the Court erred in failing to find that the allegations in paragraph VII of the respective complaints in intervention are true.

8. That the Court erred in finding that the allegations in paragraph VIII of the said respective complaints in intervention are untrue with the exception of the allegations of tender, all as referred to in finding No. XII. [97]

9. That the Court erred in failing to find that the Netherlands Casualty Company, and its sub-agent, which received the defendants' application for insurance, was the agent of complainant Consolidated Indemnity and Insurance Company for

all purposes connected with said policy and accident.

10. That the Court erred in failing to find that the knowledge of the Netherlands Casualty Company and of its sub-agent of the accident of October 19th, 1930, was attributed to and became the knowledge of the complainant.

11. That the Court erred in failing to find that the complainant corporation in issuing its policy, dated October 18th, 1930, voluntarily assumed all risks suffered under the terms of said policy between said date and the date of actual issuance regardless of whether or not it had knowledge or notice of them.

12. That the Court erred in failing to find that the complainant corporation, by issuing its policy on October 21st, 1930, and dating same as of October 18th, 1930, ratified and confirmed the agency of the Netherlands Insurance Company and of its sub-agent, in all matters connected with said policy; that the Court erred in finding that all the allegations in the complaint are true.

13. That the Court erred in failing to find that all the allegations in the complaint in intervention and in the answer are true.

14. That the Court erred in not rendering judgment in favor of Harold Leslie and against Consolidated Indemnity and Insurance Company for \$10,000.00 and interest.

15. That the Court erred in failing to render judgment in favor of the intervenor, Benschoter, and against the complainant for \$1,000.00, interest and costs.

16. That the Court erred in decreeing that said policy of insurance is null and void and should be surrendered up and [98] cancelled.

17. That the Court erred in failing to find that by dating its policy October 18th, 1930, and charging its premium as of said date, the complainant waived the communication to it of accidents occurring between October 18th, 1930, and October 21st, 1930.

18. That the Court erred in finding that it was untrue, as stated in paragraph VIII of the respective complaints of Intervenor Leslie and Benschoter, that when the policy was issued it was agreed that the assureds named therein might have sixty days from and after the date of such issuance to pay the premium and that the tender of such premium referred to in Finding XII was made on or about October 29th, 1930, and before the expiration of said sixty days.

19. That in each of the foregoing assignments where it is alleged that the Court erred in making a finding, such assignment is made on the ground that there is no evidence in the record to support such finding and also on the ground that all the evidence in the record is contrary to such finding.

20. That in the foregoing assignments of error where it is alleged that the Court erred in failing to find certain things, said assignment is on the ground that the uncontradicted evidence produced at said trial supported such finding that should have been made.

21. The Court erred in overruling the motion of Mr. Bennett on behalf of intervenor Benschoter, that the conversation between Mr. Gorham and Mr. Deasy be stricken from the record, which motion was twice made as Appellants' Exception No. 1 set forth in the narrative and Appellants' Exception No. 4.

22. The Court erred in failing to strike out the statement of the witness Deasy that the Consolidated Indemnity and Insurance Company did not accept notice of loss until actually received by [99] its claims department. This assignment relates to Appellants' Exception No. 2.

23. The Court erred in overruling the objection of all of defendants and both intervenors to the question asked by complainant of the witness Deasy if there was any difference between the manner in which his company dealt with the Netherlands Insurance Company and in which it dealt with any other broker. This is the subject of Appellants' Exception No. 3.

24. That the Court erred in disallowing the question of Mr. Hayne, propounded to the witness Gorham as to whether or not there were only two reasons why he said the Netherlands Insurance Company was a broker instead of an agent of the complainant corporation; first, because it had no agent's license; secondly, because it was not authorized to issue policies of the Consolidated. This is the subject of Appellants' Exception No. 5.

25. That the Court erred in overruling the motion of the respective intervenors that all evidence concerning the arrangement between the Netherlands and the Consolidated be stricken from the record on the ground that it sought to vary the terms of a written instrument to-wit: the policy, and that no fraud was shown. This is the subject of Appellants' Exception No. 6.

Dated this 5th day of October, 1932.

WARREN H. ATHERTON,
Solicitor for Defendants and Appellants.

NUTTER & RUTHERFORD,
A. P. HAYNE,

Solicitors for Intervenor and Appellant, Harold
Leslie.

SYDNEY C. BENNETT,
Solicitor for Intervenor and Appellant, James C.
Benschoter.

Received a copy of the within assignment of errors, etc., this 5 day of October, 1932.

GLENSOR, CLEWE, SCHOFIELD
& VAN DINE,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 5, 1932. [100]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL OF DEFENDANTS FRED STRANGIO AND TOM STRANGIO, DOING BUSINESS AS STRANGIO BROS., AND OF INTERVENORS, HAROLD LESLIE AND JAMES C. BENSCHOTER, FROM JUDGMENT AND DECREE MADE AND ENTERED AUGUST 25TH, 1932, ORDERING CANCELLATION OF INSURANCE POLICY AND DENYING RECOVERY TO INTERVENORS.

WHEREAS, the defendants Fred Strangio and Tom Strangio, doing business as Strangio Bros., and the intervenors, Harold Leslie and James C. Benschoter, have presented their petition for appeal from the judgment and decree made and entered in said cause on the 25th day of August, 1932, and accompanied the same with their assignment of errors and have prayed that said appeal be allowed;

NOW IT IS ORDERED that an appeal be allowed to said defendants, Fred Strangio and Tom Strangio, doing business as Strangio Bros., and to said intervenors, Harold Leslie and James C. Benschoter, to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment and decree made and entered on [101] the 25th day of August, 1932, and that said petition be granted upon filing of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00).

Dated this 10th day of October, 1932.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed Oct. 10, 1932. [102]

BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, Fred Strangio, Tom Strangio, Harold Leslie and James C. Benschoter, as principals, and Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto Consolidated Indemnity and Insurance Company, a corporation, in the full and just sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said Consolidated Indemnity and Insurance Company, a corporation, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of October in the year of our Lord One Thousand Nine Hundred and Thirty-two.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said Court, between Consolidated Indemnity and Insurance Company, a corporation, Plaintiff, v. Fred Strangio and Tom Strangio, doing business as Strangio Bros., Defendants, Harold Leslie and James C. Benschoter, Intervenors, No. 3040-L, a decree was rendered against the said defendants and intervenors and the said defendants and intervenors having obtained from said Court an order allowing their appeal to reverse the said decree in the aforesaid suit, and a citation directed to the said Consolidated Indemnity and Insurance Company, a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California is about to be issued;

Now, the condition of the above obligation is such, that if the said defendants and intervenors shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

Acknowledged before me the day and year first above written.

[Seal] HARTFORD ACCIDENT AND
 INDEMNITY COMPANY,
By A. E. GIANELLI,
 Attorney in Fact.

State of California,
County of San Joaquin.—ss.

On this 13th day of October in the year one thousand nine hundred and thirty-two, before me, P. J. Riordan, a Notary Public in and for said County of San Joaquin, residing therein, duly commissioned and sworn, personally appeared A. E. Gianelli known to me to be the Attorney in Fact of the Hartford Accident and Indemnity Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in

the said County of San Joaquin, the day and year in this certificate first above written.

[Seal]

P. J. RIORDAN,
Notary Public in and for the County of San
Joaquin, State of California.

My commission will expire November 22nd, 1935.

[103]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court,
for the Northern District of California, South-
ern Division:

You will please prepare for inclusion in the transcript for the record in the Circuit Court of Appeals, for the Ninth Circuit, on the appeal of defendants, Fred Strangio and Tom Strangio, doing business as Strangio Bros., and of the intervenors, Harold Leslie and James C. Benschoter, from the decree and judgment of the above entitled Court made and entered in said cause August 25th, 1932, whereby said Court granted the prayer of the bill of complaint in said action and denied the prayer of the answer of said defendants and the prayer in the complaint in intervention of each of said intervenors, a copy of each of the following pleadings, papers, documents and proceedings, to-wit:

Original complaint of complainant, Consolidated Indemnity and Insurance Company;

Answer of defendants, Fred Strangio and Tom Strangio, doing business as Strangio Bros.;

Complaint in intervention of intervenor, Harold Leslie;

Complaint in intervention of intervenor, James C. Benschoter; [104]

Answer of the complainant to the complaint in intervention of Harold Leslie;

Answer of the complainant to the complaint in intervention of James C. Benschoter;

Order of United States District Court, for the Northern Division, transferring said case for trial to the same Court for the Northern District of California, Southern Division.

Narrative of the evidence as prepared by the appellants and filed herewith, together with such amendments as may be allowed by the Court, together with the certificate of the Judge approving said narrative as amended, or otherwise;

Findings of fact and conclusions of law filed herein on or about August 25th, 1932;

Judgment or decree on said findings filed on or about August 25th, 1932;

Petition of the defendants, Fred Strangio and Tom Strangio, and of the intervenor, Harold Leslie, and of the intervenor, James C. Benschoter, for an

order allowing their appeal to the Circuit Court of Appeals, for the Ninth Circuit, from said judgment and decree of August 25th, 1932.

Assignment of errors filed by the defendants, Fred Strangio and Tom Strangio, and by the intervenors, Harold Leslie and James C. Benschoter, on appeal;

Order dated....., 1932, allowing the appeal of defendants, Fred Strangio and Tom Strangio, and intervenors, Harold Leslie and James C. Benschoter;

Order of Court fixing bond on appeal;

Bond on said appeal;

Citation on appeal;

Praecipe for record on said appeal;

Together with in each case all indorsements and certificates thereto attached. [105]

Dated, October 5, 1932.

WARREN H. ATHERTON,
Solicitor for Defendants, Fred Strangio and Tom
Strangio, doing business as Strangio Bros.

SYDNEY C. BENNETT,
Solicitor for Intervenor, James C. Benschoter.

NUTTER & RUTHERFORD,
A. P. HAYNE,

Solicitors for Intervenor, Harold Leslie.

Please furnish estimate of the clerk's charges for making and preparing the foregoing copies for

the record on said appeal. Please give such estimate to the undersigned counsel for appellants at your earliest convenience.

WARREN H. ATHERTON,
Solicitor for Defendants, Fred Strangio and Tom Strangio.

SYDNEY C. BENNETT,
Solicitor for Intervenor, James C. Benschoter.

NUTTER & RUTHERFORD,
A. P. HAYNE,
Solicitors for Intervenor, James C. Benschoter.

Received a copy of the within praecipe for transcript of record this 5th day of October, 1932.

GLENSOR, CLEWE, SCHOFIELD
& VAN DINE,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 5, 1932. [106]

[Title of Court and Cause.]

COMPLAINANT'S PRAECIPE FOR ADDITIONAL PAPERS TO BE INCLUDED IN THE RECORD ON APPEAL.

To the Clerk of the above entitled Court:

Complainant requests that in the record on appeal prepared pursuant to praecipe heretofore filed by the defendants and intervenors, there shall also be included the interrogatories propounded to de-

fendants Strangio by complainant, and the answers of defendants Strangio Bros., thereto.

Dated, October 24, 1932.

GLENSOR, CLEWE, SCHOFIELD
& VAN DINE,

Solicitors for Complainant.

[Endorsed]: Filed Oct. 26, 1932. [107]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 107 pages, numbered from 1 to 107, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Consolidated Indemnity and Insurance Company v. Fred Strangio, et al., Defendants, H. Leslie et al., Intervenors, No. 3040-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$42.75 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23 day of November A. D. 1932.

[Seal]

WALTER B. MALING,
Clerk,

B. E. O'HARA,
Deputy Clerk. [108]

CITATION.

United States of America.—ss.

The President of the United States of America to Consolidated Indemnity and Insurance Company, a corporation, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Fred Strangio and Tom Strangio, doing business as Strangio Bros., defendants, and Harold Leslie and James C. Benschoter, intervenors, are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Northern District of California, this 14th day of October, A. D. 1932.

[Seal]

HAROLD LOUDERBACK,
United States District Judge. [109]

RETURN ON SERVICE OF WRIT.

United States of America,
Nor. District of Calif.—ss.

I hereby certify and return that I served the annexed citation on appeal on the therein-named Consolidated Indemnity and Insurance Co. by handing to and leaving a true and correct copy thereof with H. W. Glensor of firm of Glensor, Clewe & Van Dine, attys. for above company personally at S. F. Calif. in said District on the 25th day of Oct., A. D. 1932.

FRED L. ESOLA,
U. S. Marshal,
By HAROLD FRIEDENBERG,
Deputy.

[Endorsed]: Filed Oct. 26, 1932.

[Endorsed]: No. 7013. United States Circuit Court of Appeals for the Ninth Circuit. Fred Strangio, doing business as Strangio Bros., and Harold Leslie and James C. Benschoter, Appellants, v. Consolidated Indemnity and Insurance Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 30, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

